Supreme Court, U.S.
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In The
Supreme Court of the United States

HIGHWAY J CITIZENS GROUP, U.A.,

Petitioner,

v.

NORMAN MINETA, et al.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In this case, respondents, the U.S. Department of Transportation (DOT), the Federal Highway Administration (FHA), and the Wisconsin Department of Transportation (WDOT), launched a major project to convert a nearly 22–mile long highway corridor into a divided, four-lane highway. This four-lane expansion project, included a bridge, referred to as the Ackerville Bridge, in the 1.3-mile long part of this corridor. This project was highly controversial, so much so that residents of the local community affected by the project formed a citizens action group opposing it, the Highway J Citizens Group, U.A., petitioner. Despite the vigorous community opposition, respondents nevertheless went forward with their plans. Under the National Environmental Policy Act (NEPA), respondents performed an Environmental Impact Statement (EIS) for a portion of the project. For the Ackerville Bridge portion of the project, respondents performed the shorter, "rough cut" Environmental Assessment (EA), after which the FHA issued a Final EA/FONSI (Finding of No Significant Impact) and the Ackerville Bridge was built. As originally proposed, the Ackerville project was to be built without a bridge; therefore, the project would not have required the driving of pilings (structures to support the bridge) into the ground.

The questions presented are:

1. Is the "arbitrary and capricious" standard of review employed by the Seventh Circuit in this case, rather than the "reasonableness" standard employed by the Third, Sixth, and Eleventh Circuits, the appropriate standard for reviewing a decision not to prepare an EIS?

2. NEPA requires completion of an environmental impact statement for major federal actions significantly affecting the quality of the human environment. Given that thousands of residents and business owners in the rural community (comprised of seven small towns and villages) opposed construction of the Ackerville Bridge, was the project sufficiently controversial, as that term is used in CEQ regulations, to require preparation of an EIS?

3. When respondents changed their construction design deciding to build the Ackerville Bridge, requiring pilings to be driven 80 feet into the ground directly in the path of a contamination plume, did the Seventh Circuit err by holding that NEPA was satisfied by "a de facto supplemental to the EA," which the court below concluded was the basis of respondents' decision that the FONSI was still valid?

PARTIES TO THE PROCEEDING

Petitioner Highway J Citizens Group is an unincorporated association comprised of approximately 6,000 homeowners and small business owners who live in Waukesha and Washington Counties in the state of Wisconsin, northwest Milwaukee, Wisconsin. Pursuant to Rule 29.6 of this Court, petitioner declares that it has no parent companies or any wholly owned subsidies. Petitioner was the appellant at the U.S. Court of Appeals for the Seventh Circuit and the plaintiff in the trial court. The respondents are Norman Mineta, in his official capacity as Secretary, United States Department of Transportation; Frederick Wright, in his official capacity as Executive Director, Federal Highway Administration; and Thomas E. Carlsen, in his official capacity as Acting Secretary, Wisconsin Department of Transportation. Respondents were the appellee at the U.S. Court of Appeals for the Seventh Circuit and the defendant at the trial court.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner in this case, Highway J Citizens Group, U.A., is an unincorporated association comprised of approximately 6,000 homeowners and small business owners who live in Waukesha and Washington Counties in the state of Wisconsin, northwest of Milwaukee, Wisconsin. Petitioner asks this Court for a writ of certitiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The court of appeals opinion (App. 1) is reported at 349 F.3d 938, 2003 U.S. App. LEXIS 22705 (7th Cir. 2003). The United States District Court for the Eastern District of Wisconsin's opinion (App. 49, App. 110) denying petitioner's motion for preliminary injunction and dismissing the case was issued on June 4, 2003, and is unreported.

JURISDICTION

The court of appeals' opinion was filed November 5, 2003. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (2003).

STATUTORY PROVISIONS INVOLVED

The relevant provision of the National Environmental Policy Act, 42 U.S.C. § 4332 (2003) is reproduced at App. 112. The relevant Council on Environmental Quality regulation, 40 C.F.R. § 1508.27 (b) (2003), is reproduced at App. 116.

STATEMENT

NEPA is a procedural statute. *Vermont Yankee Nuclear Power Corp. v. Natural Res. Defense Council*, 435 U.S. 519, 98 S.Ct. 1197 (1978). NEPA does not compel a particular outcome. *National Parks & Conservation Ass'n. v. United States Dep't of Transp.*, 222 F.3d 677, 682 (9th Cir. 2000). It does, however, require that the decision-maker follow a specified step-by-step process in order to be fully informed about the environmental consequences of a proposed federal project. *See, e.g., Northwest Coalition for Alternatives to Pesticides v. Lyng*, 844 F.2d 588, 590-91 (9th Cir. 1988) ("Under this circuit's rule of reason, the district court (1) 'must make a pragmatic judgment whether the EIS's form, content and preparation foster both informed decision-making and informed public participation,' and (2) determine 'whether an EIS contains a reasonably thorough discussion of the significant aspects of the probable environmental consequences.'"); *Stop H-3 Ass'n v. Dole*, 740 F.2d 1442 (9th Cir. 1984), *cert. denied*, 471 U.S. 1108 (1985) ("[T]he court employs a 'rule of reason' that inquires: (1) whether the EIS contains 'a reasonably thorough discussion of the significant aspects of the probable environmental consequences,' . . . and (2) whether the EIS's 'form, content and preparation foster both informed decision-making and informed public participation.") (citations omitted).

Therefore, under NEPA, federal agencies are required to prepare a "detailed statement" (Environmental Impact Statement or EIS) for "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C) (2003). Failure to follow the process renders the process invalid under the Administrative Procedures Act (APA). 5 U.S.C. § 706 (2003).

In this case, the FHA performed an EIS on a portion of the four-lane highway expansion project. The FHA, however, segmented out the Ackerville Bridge project from the EIS review process. The EA that the FHA ultimately prepared on October 29, 1999, was flawed because it failed to address the pilings that were needed to support the bridge. App. 30. Pilings, however, were driven into contaminated groundwater, releasing that contamination from the aquifer and allowing it to flow freely below the surface, thereby potentially contaminating nearby homes and businesses. The Ackerville Bridge project is in the vicinity of a former waste disposal facility, which was closed by court order over 15 years ago. App. 5. This landfill is located about 2,000 feet northwest of Ackerville and is leaking "landfill leachate," which has contaminated the underlying groundwater that flows from the landfill. App.5. As the contamination groundwater flows, the contamination can spread or disperse, and this dispersed contamination is known as 'contamination plume.' App. at 5. This contamination plume contains arsenic and trichloroethylene (TCE). App. at 4-5.

Construction of the Ackerville Bridge was universally opposed by community residents, not only because of the health threat its construction opposed, but because of its destruction of the neighborhoods, and in some cases, homes. The Highway J Citizens Group, U.A. was formed by 6,000 residents to oppose the four-lane expansion project, including the Ackerville Bridge. Members of the Highway J Citizens Group, U.A. formed in the spring of 1999, by people who live in Waukesha and Washington Counties in the state of Wisconsin, northwest of Milwaukee, Wisconsin, have expressed concerns that will intersect and split in half a rural community, and thus have significant negative affects on their human environment. App. at 4. They have voiced their objections to the negative effects that this project will have on farmland in the community.

Specifically, however, the major concern is the communities' water supply that is threatened with contamination from arsenic and trichlorethylene as a result of the Ackerville Bridge project. App. at 4. The Highway J Citizens Group, U.A. urged that respondents consider several alternatives to the Ackerville Bridge's construction. App. at 8, 10. These alternatives lacked the dire consequences posed by the construction of the Ackerville Bridge, but respondents refused to implement them.

On April 25, 2000, the Finding of No Significant Impact (FONSI) for the Ackerville Bridge project was issued. The FONSI was based on the EA for the project, which contained no analysis of the pilings necessary to support the bridge or the pilings effect on the ground water contamination, although respondents knew prior to issuance of the FONSI that the pilings would extend below the groundwater. App. at 30, 31 n.4. Indeed, respondents have acknowledged there was not a "hard look" analysis of the effect of the pilings in the FONSI. App. at 31-32. Respondents have, consistently refused to issue a supplemental EA, or to prepare an EIS, as it had done for the rest of the project. Rather, respondents asserted that the mistake in the EA did not sufficiently matter to warrant further NEPA review. App. at 37.

REASONS FOR GRANTING THE PETITION

I. The Court Should Grant This Petition to Resolve a Split Among the Circuits Regarding the Proper Standard of Review Under NEPA When the Facts Upon Which the FONSI Is Based Are Found to Be Substantially Inaccurate.

In dissenting opinions of certiorari denials in *River Road Alliance, Inc. v. Corps of Eng'rs*, 475 U.S. 1055, 106 S.Ct. 1283, 1284 (1986) (White, J, dissenting) and *Gee v.*

Boyd, 471 U.S. 1058, 1059, 105 S.Ct. 2123, 2125 (1985) (White, J. dissenting), Justice White called on the Court to address this issue because circuit courts were in "disarray" over the standard of review to be applied in reviewing an agency's decision not to prepare an EIS. He observed that the courts that invoke the abuse of discretion standard or arbitrary and capricious standard emphasize that the decision is committed to the agency's discretion and expertise while the courts that invoke the reasonableness standard stress the nondiscretionary nature of NEPA's language. *River Road Alliance, Inc.*, 475 U.S. 1055, 106 S.Ct at 1284. This Court has never squarely addressed this issue.

Had the Seventh Circuit applied the reasonableness standard of review in this case, the decision reached might have been different. Instead, however, the Seventh Circuit reviewed the FHA's decision not to prepare an EIS under an Administrative Procedures Act (APA) standard of review, a standard that even the court below described as narrow:

> The APA instructs courts to set aside agency action only if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." Under this standard, our inquiry is "searching and careful" but "the ultimate standard of review is a narrow one." We only must ask "whether the decision was based on a consideration of the relevant factors and whether there has been a clear error judgment." . . . In fact, "[t]he only role" for a court in applying the arbitrary and capricious standard in the NEPA context "is to insure that the agency has taken a 'hard look' at environmental consequences."

App. at 25-26 (citations omitted).

Arguably, the application of this narrow standard of review allowed the courts below to reach a conclusion that on its face seems improbable. First, the record shows that respondents chose not to prepare an EIS, although the record also showed that "[b]oth parties agree that there are contaminants in the groundwater in the general vicinity of the Ackerville Bridge Project." App. at 27. Likewise, the record shows that respondents refused to prepare an EIS in the face of vigorous opposition, and heated controversy over the safety of the project, backed up by credible testimony of a reputable expert, a certified hydrogeologist and a registered professional soil scientist, who has over thirty years experience in geotechnical services:

> '[T]he coarse grains along the boundaries of the driven pilings would rotate due to the shearing thereby increasing the porosity, and consequently the permeability, of the sands and gravels near the pilings.' This is the principle of dilatancy, and in this case, it means the driving of pilings will create a zone of permeability (a space that chemicals can pass through) around the outside of the pilings that would allow contamination from lower levels to migrate upward and eventually into private drinking wells and water.

App. at 29 (citations omitted).

Most surprisingly of all, the court below decided to give only cursory review of respondents' review of the environmental consequences of this project, which even the court below described was a cursory review. App. at 30-31. In short, no one has looked twice at what the impact of this bridge's construction would be on the human environment, and therefore, plainly, NEPA has not been satisfied.

Indeed, such cursory review of an agency's decision not to better inform itself of the environmental consequences on the human environment, as occurred in this case, defies the very purpose of NEPA, as explained by the Fifth Circuit:

> The spirit of the Act would die aborning if a facile, ex parte decision that the project was minor or did not significantly affect the environment were too well shielded from impartial review. Every such decision pretermits all consideration of that which Congress has directed be considered "to the fullest extent possible." The primary decision to give or bypass the consideration required by the Act must be subject to inspection under a more searching standard.

Save Our Ten Acres v. Kreger, 472 F.2d 463, 467 (5th Cir. 1973).

As anomalous as the result reached in this case, the decision below is consistent with the majority of circuit courts of appeals that employ the same standard of review of an agency's decision not to prepare an EIS. The administrative law standard (arbitrary and capricious standard) of review has been widely embraced by lower courts following a decision by this Court involving another NEPA issue in *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 109 S.Ct. 1851 (1989) (applying the arbitrary and capricious standard of review to determine if failure to supplement an EIS violated NEPA). *See Hanly v. Kleindienst*, 471 F.2d 823, 828-829 (2d Cir. 1972) ("[W]e believe that the appropriate criterion in the present case is the 'arbitrary, capricious' standard."); *Sabine River Auth. v. Dep't of the Interior*, 951 F.2d 669, 677 (5th Cir. 1992) ("[T]he Supreme Court held that an agency's decision not to prepare a supplemental EIS is reviewable under the 'arbitrary

and capricious' standard."); *Lockhart v. Kenops*, 927 F.2d 1028, 1033 (8th Cir. 1991) ("An agency's decision not to prepare an EIS is reviewed under [the arbitrary and capricious] standard."); *Friends of the Payette v. Horseshore Bend Hydroelectric Co.*, 988 F.2d 989, 993 (9th Cir. 1993) ("[W]hen a litigant challenges an agency determination on grounds that, in essence, allege that the agency's 'expert review . . . was incomplete, inconclusive, or inaccurate,'. . . the arbitrary and capricious standard is appropriate."); *Village of Los Ranchos de Albuquerque v. Marsh*, 956 F.2d 970, 973 (10th Cir. 1992) ("[T]he court believes it preferable to use the arbitrary and capricious standard to review an agency's determination of the necessity of both an initial and a supplemental EIS, at least where the issue is whether the project will have significant environmental impact."); *Boles v. Onton Dock, Inc.*, 659 F.2d 74, 75 (6th Cir. 1981) (determining that the Corps of Engineers' decision was not arbitrary and capricious); *Hill v. Boy*, 144 F.3d 1446, 1450 (11th Cir. 1998) ("We review an agency's decision not to prepare an EIS under an 'arbitrary and capricious' standard of review.").

Nevertheless, many other circuit courts of appeal have struggled with this issue, and have even applied what is known as the "reasonableness" standard of review, which is a more searching scrutiny of the agency's decision not to require an EIS than the arbitrary and capricious standard of review. Many of these circuits have openly struggled with this issue of which standard to apply, and questioned if the selection makes a substantive difference. *See Peshlakai v. Duncan*, 476 F. Supp. 1247, 1252 (D.D.C. 1979) ("The burden is on plaintiffs to establish that a decision not to require an EIS constitutes a violation of NEPA. Such a decision will be reversed by a court only if it is unreasonable or arbitrary and capricious."); *Airport Impact Relief, Inc. v. Wykle*, 192 F.3d 197 (1st 1999) (holding that the arbitrary and capricious standard is not a rubber stamp); *South Trenton*

Residents Against 29 v. Federal Hwy. Admin., 176 F.3d 658 (3rd. Cir. 1999) ("Our standard of review concerning the agency's decision not to draft a Supplemental Environmental Impact Statement is less settled."); *Hodges v. Abraham*, 300 F.3d 432, 445 (4th Cir. 2002) ("[W]e must 'make a searching and careful inquiry into the facts and review whether the decision [of the agency at the time it was made] was based on consideration of the relevant factors and whether there has been a clear error of judgment.") (alteration in original).

II. The Court Should Grant This Petition to Resolve Confusion Among the Circuits on the Issue of Whether Opposition to a Project Is a Factor That Can By Itself Trigger the Duty to Prepare an EIS.

Under NEPA, federal agencies must prepare a detailed statement (EIS) for all actions "significantly affecting the quality of the human environment." 42 U.S.C. §4332 (2)(C) (2003). The purposes of NEPA are to "encourage productive and enjoyable harmony between man and his environment; to promote efforts which prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man . . . ." 42 U.S.C. 4321 (2003). "If a federal action 'significantly [affects] the quality of the human environment,' then the implementing agency must prepare an Environmental Impact Statement (EIS) providing a detailed and comprehensive analysis of the potential environmental impacts of the proposed action." *Anderson v. Evans*, No. 02-35761, 2002 U.S. App. LEXIS 28156, *1, 23-24 (9th Cir. Dec. 20, 2002) (citing 42 U.S.C. § 4332 (C); 40 C.F.R. § 1502 et seq.); *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1212 (9th Cir. 1998).

The Council on Environmental Quality (CEQ) has promulgated regulations that provide factors that agencies must consider in deciding whether to prepare an EIS relating

specifically to issue of the effects on the human environment. CEQ's regulations underscore the importance that the human environment is to play in the NEPA review process. For example, the regulations provide that "[f]ederal agencies shall to the fullest extent possible . . . [e]ncourage and facilitate public involvement in decisions which affect the quality of the human environment." 40 C.F.R. § 1500.2 (2004). CEQ's regulations define "significantly" as requiring an analysis of the "context" and the "intensity" of the action. 40 C.F.R. § 1508.27 (a), (b) (2004). "Context" is defined as "the significance of an action [that] must be analyzed in several contexts such as society as a whole (human, national), the affected region, the affected interests, and the locality." 40 C.F.R. § 1508.27 (a) (2004). "Intensity" "refers to the severity of impact," and the regulations list several factors to be considered when evaluating Intensity. 40 C.F.R. § 1508.27 (b)(1)-(10) (2004). For example, an agency is to prepare an EIS if "[t]he degree to which the effects on the quality of the human environment are likely to be highly controversial." 40 C.F.R. § 1508.27 (b)(4) (2004).

The Ninth Circuit Court of Appeals has held that opposition to a project by itself can force preparation of an EIS. In *National Parks & Conservation Assoc. v. Babbitt*, 241 F.3d 722 (9th Cir. 2001), plaintiffs sought an appeal from a district court decision holding that the National Park Service was not required to prepare an EIS to review a plan to increase the number of times cruise ships entering Glacier Bay each summer. In addressing the "controversy" factor, the district court found that the NCRA had not made a sufficient showing of controversy to require preparation of an EIS. The Ninth Circuit disagreed, noting that the National Park Service received 450 comments 85% of which opposed a large increase in the number of vessels. The Ninth Circuit held that this "volume of negative comment is more than sufficient to meet the 'out-pouring of public protest. . . ." *Id.* at 736; *see also Public Citizen v. U.S. Dept. of*

Transportation, 316 F.3d 1002, 1026 (9th Cir. 2002) (finding that a project was sufficiently controversial when 90% of the comments opposed a DOT project and these comments were not addressed by an EA); *Foundation for North American Wild Sheep v. United States*, 681 F2d 1172, 1182 (9th Cir. 1982) (holding the receipt of numerous responses from conservationists, biologists, and other knowledgeable individuals, all highly critical of the EA and all disputing the EA's conclusion that no significant impact would occur, "is precisely the type of 'controversial' action for which an EIS must be prepared."); *Sierra Club v. United States Forest Service*, 843 F.2d 1190, 1195 (9th Cir, 1988) ("Because substantial questions have been raised concerning the potential adverse effects on harvesting these timber sales, an EIS should have been prepared. The Forest Service's decision not to do so was unreasonable. It failed to account for factors necessary to determine whether significant impacts would occur."); *Ind. Forest Alliance, Inc. v. United States*, 325 F.3d 851, 857 (7th Cir. 2003) (holding once a dispute exists, "NEPA then places the burden on the agency to come forward with a 'well-reasoned explanation' demonstrating why opinions disputing an EA's conclusions 'do not suffice to create a public controversy based on potential environmental consequences.'"). *Compare Wetlands Action Network v. Army Corps of Eng'rs*, 222 F.3d 1105, 1121 (9th Cir. 2000) (holding that because the EA addressed the concerns and objections raised by conservation groups, there was no significant controversy under NEPA); *Society Hill Towers Owner's Association v. Rendell*, 210 F.3d 168 (3rd Cir. 2000) (holding "[r]esidents have not raised a substantial dispute regarding the environmental effects identified by the City in its EA for this project").

The Seventh Circuit, in this case, appeared not to consider public controversy as a factor. Opposition to the Ackerville Bridge project has been consistent throughout the review process and throughout the bridge's construction.

The Highway J Citizens Group, U.A. consistently urged respondents to take a "hard look" at the environmental consequences of the Ackerville Bridge project and to prepare an EIS. The members of the Highway J Citizens Group, U.A. vigorously used every avenue available to them to express their concerns over the validity of respondents' proposal to construct the Ackerville Bridge. Even after the FONSI was issued, when members of the Highway J Citizens Group, U.A. learned that pilings would be driven up to 80 feet into the ground, in the pathway of the contamination plume, they engaged an expert who evaluated the danger of contamination to their groundwater. App. at 18,29.

In light of the intense controversy over respondents' decision to construct the Ackerville Bridge, it would appear that the CEQ's regulation stating that an EIS must be prepared if "the effects on the quality of the human environment are likely to be controversial," as triggered and the duty to prepare an EIS for construction of the Ackerville Bridge had been more than satisfied. 40 C.F.R. §1508.27 (b)(4) (2004).

In this case, however, the Seventh Circuit concluded that an EIS was not required, and concluded that if the agency took even a cursory "hard look" at the relevant information and consequences, NEPA was satisfied. App. at 31-33.

III. The Court Should Grant This Petition to Resolve the Split Among the Circuits, Created by This Decision, Concerning the Need to Supplement an Environmental Assessment When There Are Significant New Circumstances or Information Relevant to Environmental Concerns and Bearing on the Proposed Action or Its Impacts.

The CEQ's regulations state that a federal agency must prepare a supplemental impact statement if "the agency

makes substantial changes in the proposed action that are relevant to environmental concerns," or if "there are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." 40 C.F.R. §1502.9(c)(1)(ii) (2004); *see also* 49 C.F.R. § 1105.10(a)(5) (2004) (The Department of Transportation's regulations state: "An Environmental Impact Statement may be supplemented where necessary and appropriate to address substantial changes in the proposed action or significant new and relevant circumstances or information."); 23 C.F.R. § 771.130 (a)(2)(2004) (The Federal Highway Administration's regulations state: "An EIS shall be supplemented whenever the Administration determines that . . . [n]ew information or circumstances relevant to environmental concerns and bearings on the proposed action or its impacts would result in significant environmental impacts not evaluated in the EIS.").

This Court has explained why the regulations require that an agency supplement an EIS: "[I]t would be incongruous with [NEPA's] approach to environmental protection . . . for the blinders to adverse environmental effects, once unequivocally removed, to be restored prior to completion of agency action simply because the relevant proposal has received initial approval." *Marsh v. Oregon Natural Res. Council*, 490 U.S. 360, 371,109 S.Ct. 1851, 1858 (1989).

Other courts have applied this requirement to EA's as well as EIS's. If new information is made available, and "the environmental impacts resulting from the design change are significant or uncertain, as compared with the original designs' impacts," then the agency must prepare a supplemental EA or EIS. *Idaho Sporting Congress, Inc. v. Alexander*, 222 F.3d 562, 566 (9th Cir. 2000);
see also Price Rd. Neighborhood Ass'n v. United States Dep't of Transp., 113 F.3d 1505, 1508-09 (9th Cir.

1997)("[S]upplemental [EIS] is . . . required when the environmental impacts reach a certain threshold - i.e. significant (defined at 40 C.F.R. § 1508.27) or uncertain.").

In this case, however, the Seventh Circuit developed a new procedure, the "de facto supplemental EA," which does not require actual compliance with the regulations, creating a split among the circuits. App. at 36-41. Notably, the Seventh Circuit itself recognized that "[respondents] appear to acknowledge there was not a 'hard look' analysis of the effect of the pilings in April of 2000," when the FONSI was finalized. App. at 31. The Seventh Circuit, however, concluded that respondents remedied this by preparing a subsequent memo on August 22, 2000. App. at 36-41.

Other courts that have held that supplemental information reports (SIRS) can be relied on by an agency only to evaluate the significance of new information or changed circumstances for determination of whether a supplemental EA or EIS is required. *See, e.g., Idaho Sporting Congress, Inc. v. Alexander*, 222 F.3d 562, 565-566 (9th Cir. 2000) ("[C]ourts have upheld agency use of SIRs and similar procedures for the purpose of determining whether new information or changed circumstances require the preparation of a supplemental EA or EIS.").

An agency, however, cannot substitute a Supplemental Information Report for a supplemental EA or EIS:

> It is inconsistent with NEPA for an agency to use an SIR, rather than a supplemental EA or EIS, to correct this type of lapse. NEPA is a procedural statute, and we have held that "agency action taken without observance of the procedure required by law will be set aside." Yet if the Forest Service were permitted to correct deficiencies in an EA or

> an EIS by means of a SIR or another non-NEPA procedure, the regulations governing the supplementation of NEPA documents promulgated by the CEQ, as well as the Forest Service's own rules on the issue, would be superfluous.

Id at 567.

In *Grazing Fields Farm v. Goldschmidt*, 626 F.2d 1068 (1st Cir. 1980), the First Circuit held that even the existence of supportive studies and memoranda contained in the administrative record but not incorporated in the EIS cannot "bring into compliance with NEPA an EIS that by itself is inadequate." *Id.* at 1072. Because of the importance of NEPA's procedural and informational aspects, if the agency fails to properly circulate the required issues for review by interested parties, then the EIS is insufficient even if the agency's actual decision was informed and well-reasoned. Likewise, in *Hodges v. Abraham*, 300 F.3d. 432 (4th Cir. 2002), the Fourth Circuit stated that if the environmental impacts from a design change are significant or uncertain, the agency must complete additional NEPA documentation. Agency's authority to conduct an internal document review is limited and that if it is "possible" that the new circumstances are significant, additional NEPA documentation is required. *Id.* at 445; *see also Protect Key West, Inc. v. Cheney,* 795 F. Supp. 1552, 1562 (S.D. Fla. 1992) (concluding that post-hoc rationalization occurred when documents were submitted after EA/FONSI process).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: February 3, 2004

349 F.3d 938

HIGHWAY J CITIZENS GROUP, Plaintiff-Appellant, v. NORMAN MINETA, in his official capacity as Secretary, United States Department of Transportation; FREDERICK WRIGHT, in his official capacity as Executive Director, Federal Highway Administration; THOMAS E. CARLSEN, in his official capacity as Acting Secretary, Wisconsin Department of Transportation, Defendants-Appellees.

No. 03-2644

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

September 19, 2003, Argued
November 5, 2003, Decided

PRIOR HISTORY: Appeal from the United States District Court for the Eastern District of Wisconsin. No. 02 C 662. Charles N. Clevert, Jr., Judge.

DISPOSITION: Affirmed.

LexisNexis (TM) HEADNOTES - Core Concepts:

COUNSEL: For HIGHWAY J CITIZENS GROUP, Plaintiff-Appellant: Robert B. Corris, Milwaukee, WI USA.

For NORMAN Y. MINETA, in his capacity as Secretary, US Department of Transportation, FREDERICK WRIGHT, in his capacity as Executive Director, Federal Highway Administration, Defendants-Appellees: Charles A. Guadagnino, OFFICE OF THE UNITED STATES ATTORNEY, Milwaukee, WI USA.

For THOMAS W. CARLSEN, in his capacity as Acting Secretary, Wisconsin Department of Transportation, Defendant-Appellee: Frank D. Remington, OFFICE OF

THE ATTORNEY GENERAL, Wisconsin Department of Justice, Madison, WI USA.

JUDGES: Before BAUER, RIPPLE and WILLIAMS, Circuit Judges.

OPINION BY: RIPPLE

OPINION:

RIPPLE, *Circuit Judge*. On July 3, 2003, the Highway J Citizens Group ("Citizens") filed this action pursuant to the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-06; the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 et seq.; regulations implementing NEPA; and the Wisconsin Environmental Policy Act ("WEPA"), Wis. Stat. § 1.11 & Wis. Adm. Code ch. TRANS § 400 et seq. The named defendants were Norman Mineta, in his official capacity as Secretary of the United States Department of Transportation ("U.S. DOT"); Frederick Wright, in his official capacity as Executive Director of the Federal Highway Administration ("FHWA"); and Thomas E. Carlsen, in his official capacity as Acting Secretary of the Wisconsin Department of Transportation ("WDOT") (collectively "defendants").[1]

Citizens challenged the Ackerville Bridge/Lovers Lane Project, Project # 2748-01-00 ("Ackerville Bridge Project") and the County J/Highway 164 Project, Project # 2748-01-01 ("County J/Highway 164 Project"). According to the complaint, a "contamination plume" containing arsenic

[1] The FHWA, the federal agency in this case, worked in consultation with WDOT, the funding applicant, in performing the tasks required by NEPA. *See* 23 C.F.R. § 771.119.

and trichlorethylene ("TCE") is migrating toward the site of the Ackerville Bridge. Among other things, Citizens asked the district court (1) to enjoin the FHWA and WDOT from proceeding with the Ackerville Bridge Project until the location and extent of the contamination plume was determined, (2) to order the FHWA and WDOT to pump grout around the perimeter of pilings that have been driven into the ground to support the Ackerville Bridge, and (3) to require the FHWA to prepare an Environmental Impact Statement ("EIS") for the Ackerville Bridge Project. On June 12, 2003, the United States District Court for the Eastern District of Wisconsin denied Citizens' motion for a preliminary injunction and then ruled against Citizens on the merits. On June 13, 2003, the district court denied Citizens' expedited motion for stay pending appeal.

Citizens filed its notice of appeal on June 17, 2003. It then asked this court for an emergency injunction to prevent the opening of the Bridge. This court denied the requested relief, but granted Citizens' motion for an expedited appeal. In this appeal, Citizens seeks (1) a permanent injunction requiring closure of the Ackerville Bridge until grout is pumped around the pilings, (2) an EIS of the Ackerville Bridge Project, and (3) a revised EIS of the County J/Highway 164 Project that encompasses the area of the Ackerville Bridge Project and a permanent injunction prohibiting the County J/Highway 164 Project from proceeding until the revised EIS is completed. For the reasons set forth in this opinion, we must deny Citizens the requested relief and affirm the judgment of the district court.

I

BACKGROUND

A. Facts

There are two projects at issue in this case; both are "major federal actions" as defined in 40 C.F.R. § 1508.18. Highway J Citizens Group is an unincorporated association of residents of Waukesha and Washington Counties in Wisconsin who are "committed to preserving the beauty, tranquility, and environment of the area." R.1 at ¶ 1. Specific to this litigation, Citizens also includes persons "who live in the area of the proposed Ackerville bridge and whose water supply is threatened with contamination from arsenic and TCE as a result of the proposed Ackerville bridge project." R.1 at ¶ 1. Thus, Citizens' focus in this case is Project # 2748-01-00, the Ackerville Bridge Project. Project # 2748-01-01, the County J/Highway 164 Project, is relevant to this litigation only because Citizens believes that it was improperly segmented from the Ackerville Bridge Project.

1. The Ackerville Bridge Project (Project # 2748-01-00)

There are three purposes for the Ackerville Bridge Project. The "primary purpose" is to address safety considerations flowing from the layout of the roads and the close proximity of the railroads. R.38, Ex.1003, A.R. at 00004. Another purpose is to bring the existing facility into compliance with State Trunk Highway standards, which govern the necessary requirements for a road to support truck traffic. *Id.* at 00013. A "secondary purpose" is to provide for future expansion of the roadways due to

increasing traffic in the region. *Id.* at 00004. To affect these purposes, the plan provides

> an overpass structure . . . to be built at the Wisconsin Central Limited and the Wisconsin Southern Railroads in order to remove the existing at-grade crossings. The Sherman Road/Fond du Lac Drive connection would also be located under this structure. An additional overpass would be provided at State Highway 175.

Id. at 00012.[2]

The environmental assessment ("EA") for this Project was signed by various state and federal officials between October 29, 1999, and December 12, 1999, and was open for public comment from February 22, 2000, to April 7, 2000. *Id.* at 00004. The EA as originally published did not contain a discussion of the former waste disposal facility ("landfill") near the Project that was owned by Waste Management Company of Wisconsin, Inc. This landfill is located about 2,000 feet northwest of Ackerville and is leaking "landfill leachate" which has contaminated the underlying groundwater that flows from the landfill. As the contaminated groundwater flows, the contamination can spread or disperse, and this dispersed contamination is known as "contamination plume."

The effect of this contamination plume on the Ackerville Bridge Project was brought to the attention of the defendants by Jeffrey Gonyo, a member of Citizens, sometime during, and possibly before, February of 2000. R.38, Ex.1013, A.R. at 00838 (Wade e-mail); R.38, Ex.1005,

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[2] A Project map is attached as Exhibit A.

A.R. at 00146-00147 (draft "Fact Sheet/Topics of Interest"). Defendants' initial conclusion was that the contamination plume did not raise significant concerns in relationship to the Ackerville Bridge Project. For example, in a February 21, 2000 document entitled "Fact Sheet/Topics of Interest," defendants stated:

> The Waste Management Landfill-Hazardous Materials. If there is contamination in the shallow groundwater, couldn't the structure pilings create a "channel" to contaminate [sic] the deep groundwater where our drinking water comes from?:
>
> *Acknowledge that both Wisconsin Department of Natural Resources and WDOT are aware of the concerns relating to the Polk Landfill. You can thank Mr. Gonyo for helping to bring the issue to the forefront.*
>
> *WDOT will be addressing the contaminant concerns relating to the STH 164 project as part of the Phase 1 hazardous materials assessment. The assessment will evaluate WDNR documents about the landfill and assess what impact may be associated with the highway project activities. The WDOT will coordinate with the WDNR as needed. The report will include any recommendations that may be needed to address [hazardous materials] concerns.*
>
> *The Phase 1 Assessment Report will become a public document available for review.*
>
> *Though preliminary assessment of available information has led* [sic] *both WDNR and WDOT to think there are not likely to be significant project hazmat concerns related to the Polk Landfill, it*

> *would be premature to make definitive statements until the Phase 1 report is completed.*

R.38, Ex.1005, A.R. at 00143-00144 (italics in original). A previous, draft version of that document, dated February 15, 2000, addressed the environmental question posed as follows:

> *This landfill was closed in the 1980's. Since that time, extensive monitoring and remediation has taken place. There has been some concern regarding the ground water contamination spreading in the direction of Lovers Lane Road. However, the project requires limited excavation in the area (footing for substructure units of the bridge) and encounters with ground water is unlikely.*

R.38, Ex.1008, A.R. at 00146. In a March 14, 2000 letter from Ken Wade, Hazardous Materials Engineer for the Environmental Team, Transportation District 2 of WDOT, to EMCS Design Group, Mr. Wade noted:

> I've attached copies of the latest landfill data collected by Waste Management. It clearly confirms that the concentration of [TCE] nearest the project area is decreasing and stable. The groundwater monitoring well nearest the project corridor is TW23R, located approximately 400 feet west of CTH J. TCE concentrations in well TW23R have dropped from 3 to 2.2 ug/l, well below the WDNR groundwater enforcement standard of 5 ug/l.
>
> The water table for this region is approximately 30 feet below the ground surface. If construction plans for the footings require only 4 to 5 feet of excavation, it is very unlikely that contaminated groundwater will impact the project.

> It is also unlikely that project pilings or water detention/infiltration basins will cause an impact on plume movement or concentrations.

R.38, Ex.1009, A.R. at 00728.

At the March 23, 2000 public hearing on the Ackerville Bridge Project, Mr. Gonyo testified in opposition to the Project. Among other things, he identified the landfill as a source of contamination that the Project threatened to aggravate. With the aid of numerous exhibits, he testified that: (1) the Project goals could be accomplished by simpler and less costly means, (2) the Ackerville Bridge Project should not be segmented from the County J/Highway 164 Project, and (3) the landfill contaminants pose great risks in conjunction with the Project.

On April 7, 2000, the "Hazardous Materials Site Investigation Report Phase I Addendum" ("Addendum") was released. R.38, Ex.1015, A.R. at 00709-00714. This Addendum was prepared by the EMCS Design Group, which worked in connection with the WDNR in developing the report. The Addendum is based on a review of the March 30, 1990 report entitled "Two-Year Ground Water Monitoring Report Polk Sanitary Landfill Washington County, Wisconsin." This report discusses the groundwater around the landfill, including its flow, contains maps and discussions of arsenic and TCE, and concludes that the landfill was not the source of downgradient TCE detections or elevated arsenic levels. R.38, Ex.1000, A.R. at 02774-02814. The 2000 Addendum is also based on a review of the "Phase I and Phase II Hazardous Material Reports," R.38, Ex.1014, A.R. at 00873-00908, which "were completed in 1994 for this project based on" the originally conceived limited scope of the Project, which did not include a bridge. R.38, Ex.1015, A.R. at 00710. The "February 23,

1994 Phase I Report" identified groundwater in the area as potentially contaminated and noted that WDNR was continuing to monitor it. It added, "The groundwater depth should be determined within the project limits so that excavation to the groundwater depth during construction can be avoided." R.38, Ex.1014, A.R. at 00876. In the Addendum, the landfill is addressed as follows:

> *Site 7* (previous): Town of Polk/Waste Management (WDNR FID # 267062400) was identified in the original phase I report as an inactive waste disposal site. There is groundwater contamination in this area with [TCE] being one of the contaminants. The closest monitoring well is located approximately 400 feet west of STH 164. TCE concentrations in this well have dropped from 3 to 2.2 ug/l, well below the WDNR groundwater enforcement standard of 5 ug/l. This site is 700 feet west of where the proposed Foxboro extension connects to STH 175 and indicated groundwater depths of 30 feet are well below the excavation limits of the roadway. Therefore, it is very unlikely that the contaminated groundwater will impact this project. It is also unlikely that the pilings for the structure supports or retention basins will cause an impact on plume movements or concentrations.

R.38, Ex.1015, A.R. at 00714.

On April 25, 2000, the last signature was placed on the "Finding of No Significant Impact" ("FONSI") for the Project. The FONSI was premised on the EA for the Project, which was attached to the FONSI. The final EA/FONSI contains a "Basic Sheet A" which includes the comments from the public on the Project and defendants' responses to the comments. Specifically, Basic Sheet A

considers whether the landfill "is a significant impact and therefore warrants preparation of an EIS," but concludes the landfill "will not affect the Department's proposed project." R.38, Ex.1003, A.R. at 00005. It explained:

> There is ground water contamination in the area surrounding the landfill with [TCE] being one of the contaminants. This site has been under remediation for several years. The closest monitoring well is located approximately 122 m (400 ft) west of STH 164. TCE concentrations in this well have dropped from 3 to 2.2 ug/l, well below the WDNR groundwater enforcement standard of 6 ug/l. Indicated ground water depths of 9m (30 ft) are well below the excavation limits of the roadway or bridge construction.
>
> The Department has determined that the potential for encountering and impacting hazardous materials during construction of this project does not exist. Therefore, there is no purpose or need for preparation of an EIS.

Id. The EA/FONSI also responded to Citizens' suggestion that the Ackerville Bridge Project and the County J/Highway 164 Project be joined together as one EIS. After considering the three criteria for segmentation set out in FHWA regulations, *see* 23 C.F.R. § 771.111(f)(1)-(3), it concluded that "the selected alternative has logical termini, independent utility, and does not preclude or exclude future alternatives for other projects. It is therefore appropriate that [the Ackerville Bridge Project] be allowed to stand on its own merit." *Id.* at 00004. The EA/FONSI also considered alternatives, including the alternative proposed by Citizens, but concluded that the best alternative to effectuate all of the purposes of the Project includes the Ackerville Bridge. *Id.* at 00006, 00013.

On July 7, 2000, Mr. Gonyo sent a letter to Paul Tufts, an environmental specialist at the FHWA, requesting that the defendants reconsider the FONSI and that an EIS be prepared before any construction on the Project. This letter specifically notes as a concern that "the pilings will have to be driven into and below the contaminated groundwater table." R.38, Ex.1017 at 2. According to the defendants, Richard Madrzak of the FHWA requested information from Jay Waldschmidt of the WDOT, Bureau of Environment, to respond to Mr. Gonyo. R.29 at 10. During their oral conversation, Mr. Waldschmidt discussed previous conversations with Chad Czarkowsi and Phil Fauble of WDNR, and then Mr. Madrzak asked to have something in writing. *Id.*

On August 22, 2000, the WDNR provided the WDOT a memorandum, per the request of Mr. Waldschmidt, in response to the groundwater concerns. R.38, Ex.1020, A.R. at 12294. The authors of the memo are Chad Czarkowski and Phil Fauble, both of whom have extensive experience with groundwater issues with WDNR. This 2½ page, single spaced memo has as its main conclusion that "the road project will not have any substantial effect [sic] on the existing pattern of groundwater flow, concentration of contaminants, nor cause any increase in health risks due to ground water contamination in the vicinity." *Id.* at 12295. In support of that conclusion, the memo noted that

> the TCE seems to originate from a point approximately 1500 feet west/northwest of Hwy 164 and Sherman Road. Groundwater flow has been determined to be southeasterly from the apparent source, towards the proposed road project. The top of the water table in the gravel aquifer below the road project area is approximately 30 feet below the land surface.

Id. As to the concentrations of TCE, the memo stated that in the mid-1980s, area wells had been tested for TCE, and levels exceeded Wisconsin's enforcement standard of 5 ug/l. *Id.* However, the landfill "is not considered a likely source of the TCE plume because TCE has not been detected in either the landfill leachate or consistently in monitoring wells directly adjacent to the landfill." *Id.* The memo further noted that the private wells determined to be at risk from the waste disposal sites were sampled in the 1980s, and they were subsequently either abandoned altogether, abandoned and replaced with "deeper dolmite aquifer wells cased to the top of the first bedrock at 220 feet," or sampled and found clean. *Id.*

Finally, the memo considered three mechanisms by which the project could conceivably affect groundwater in the vicinity. The one relevant to this appeal is: "Driving pilings to depths greater than 30 feet could potentially encounter contaminated groundwater." *Id.* at 12296. On this issue, the memo concluded that

> such vertical steel pilings would not, in themselves, contribute any additional contaminants to the groundwater, nor significantly alter flow along any horizontal plane. Theoretically, the flow of groundwater could be altered along vertical lines due to penetration of a piling thru lenses or layers of dense, clay-rich soil known as "confining layers" or aquatards. Such layers, if present, normally act to prevent downward or upward movement of groundwater. A piling might compromise a confining layer by creating a narrow (0.5"-3" maximum) concentric space along the outside shaft of a piling or casing.
>
> However, we believe the placement of pilings will not significantly affect ground water conditions

> on this project. As documented by well logs and soil borings, there is no effective, continuous confining layer in the project area. Without any effective separation of the shallow sand and gravel aquifer from the deeper dolomite aquifer, ground water already moves freely along vertical planes. In fact, several well nests near the proposed project record consistent upward gradients, an indication that deeper aquifer water is discharging into the shallower system. The relatively small increase in vertical groundwater movement which might be expected along open spaces surrounding even several dozen pilings is insignificant compared to the quantity of natural vertical movement.
>
> In conclusion, there does not appear to be any mechanism by which the existing groundwater conditions will be significantly altered by the road project.

Id. at 12296-12297. On August 23, 2000, Mr. Madrzak sent an e-mail to Paul Tufts, the addressee on Mr. Gonyo's letter requesting reconsideration of the FONSI, discussing the August 22, 2000 memo:

> Attached for your information is a copy of DNR's response to my request through Jay Waldschmidt for information regarding Mr. Gonyo's allegation that the project will have a significant effect on the environment with regard to hazardous materials.
>
> The DNR note confirms the information contained in the revisions to the Environmental Assessment. The FONSI remains valid despite Mr. Gonyo's objections. We will respond accordingly to his request for FHWA to withdraw approval of the FONSI.

> His other concerns regarding segmentation are adequately discussed in the revisions to the EA.

R.11, Ex.5 (attached e-mail). On August 24, 2000, the FHWA sent a letter to Mr. Gonyo responding to his July 7, 2000 letter. In accord with Mr. Madrzak's e-mail, this letter concludes that the April 2000 FONSI/EA remains valid and meets the intent and requirements of NEPA.

Citizens expressed its concerns to the United States Environmental Protection Agency ("U.S. EPA") in various petitions in the first five months of 2000, and on August 28, 2000, the WDNR sent a letter to Jan Pels of the U.S. EPA explaining its conclusions regarding the extent of the contamination plume and the Project's effect on the plume. R.38, Ex.1023, A.R. at 10166-10171. The letter concluded that "there is no evidence that existing private water supply wells are being impacted by groundwater." R.38, Ex.1023, A.R. at 10171. As to the Project, it stated in full: "The WDNR has also determined that the proposed WDOT road expansion and bridge project on STH 164 will not have an adverse impact on the ground water in the Ackerville area. The rationale for this determination is detailed in the attached memo from WDNR to WDOT." *Id.* On January 12, 2001, the U.S. EPA sent Mr. Gonyo a letter regarding his request for an investigation of the Waste Management landfill. The letter stated that the WDNR is in the process of "preparing a Sampling and Analysis Plan for a [Site Inspection] of the Old Town Dump site." R.38, Ex.1024, A.R. at 10164-10165. This "Old Town Dump site" is a landfill just south and across the tracks from the Waste Management landfill, and the WDNR and U.S. EPA believed this landfill may be the actual source of the contamination. *Id.* at 10164.

On January 22, 2001, John E. Thresher, Jr., Citizens' groundwater expert, provided Fauble with criticisms of WDNR's groundwater analysis at the Waste Management landfill. This report discussed the extent and source of the TCE, concluding a "reasonable case can be made" the Waste Management landfill is the source. R.39, Ex.1025, A.R. at 12301-12304, 12307-12308. It also discussed arsenic, which the report explained was in the vicinity of the landfill and migrating toward Ackerville, and explained that the degree and extent of arsenic is not known due to various factors. The letter concluded with a strong request that an EA be performed to address these concerns. The letter did not discuss the Ackerville Bridge Project.

On February 26, 2001, EMCS Design Group issued a report officially acknowledging the pilings for the Project would extend below groundwater level. On July 10, 2001, a public hearing was held regarding WDOT's petition to the Office of the Commissioner of Railroads of the State of Wisconsin ("OCR") for alteration and closure of crossings for purposes of the Ackerville Bridge Project. At this hearing, Mr. Gonyo and other citizens testified about their concerns regarding the environmental impacts of the Project, and Mr. Thresher, Citizens' expert, testified as to his conclusions. Mr. Bauman of WDOT also testified. On July 11, 2001, Mr. Thresher sent a follow-up letter to the hearing examiner at the OCR hearing. In that letter, he restated his position that contaminated water is moving towards Ackerville and that "driving pilings through such sediments may disrupt the contaminant distribution thereby potentially contaminating additional private wells within Ackerville." R.39, Ex.1028, A.R. at 14559-14560.

In an e-mail dated July 26, 2001, Mr. Bauman of WDOT referenced a June 2001 article in *Civil Engineering* analyzing the environmental impact of pilings placed into contaminated soil entitled "Deep Foundations on Brownfield Sites." This article concluded, among other things, that "driven piles can be used on even 'brownfields' sites without causing adverse environmental effects. However, the proper type(s) of piles must be selected to avoid such effects . . . such as steel and possibly concrete to avoid internal flow." R.39, Ex.1030, A.R. at 13833.

Mr. Czarkowski of the WDNR, one of the authors of the August 22, 2000 memo that found the pilings would have only an insignificant effect on the groundwater, responded to Mr. Bauman by e-mail: "When I first reviewed the environmental concerns regarding this project as part of the team here at DNR, I was aware that pilings would be driven below depths of 30 feet, which is where the groundwater occurs. We do not dispute that a very low level of [TCE] may exist in the groundwater." R.39, Ex.1031, A.R. at 13827. Mr. Czarkowski went on to state that his opinion that the pilings would not in any way affect groundwater flow was based on the assumption the pilings would be filled with solid material. He wanted to ensure that such was the case so he could maintain his opinion, memorialized in the August 22, 2000 memo, that the pilings "should not provide a significant pathway for migration of groundwater." *Id.* Mr. Bauman responded to Mr. Czarkowski on August 27, 2001, and confirmed that the pilings would be filled with concrete. *Id.*

On September 20, 2001, the WDOT attended a meeting called by Wisconsin State Representative Suzanne Jeskewitz to discuss Mr. Gonyo's testimony at the OCR

hearing. WDOT's "Public Communication Record" described the meeting in its "Discussion Summary":

> Began to discuss parts of Mr. Gonyo's testimony (13 points), but only completed first one on project cost and bridge size. Discussion then went to John Thresher's statements on potential impact of bridge piling on local groundwater contamination. Mr. Thresher states that in his opinion the WisDNR did not do a sufficient amount of study to determine the location of the contaminants and that the bridge piling could transfer the contamination to area wells.

A.R. at 10453. In the "Point Made" section of the Record, it stated in relevant part: "WisDOT did not agree with Mr. Thresher's assertion that contaminated groundwater in the area could be impacted by our project. WisDNR has told WisDOT that pilings from the proposed structure will not cause contamination to spread to neighboring wells." *Id.*

On October 19, 2001, the OCR issued a final decision granting the petition of the WDOT to alter and close the railroad tracks in the vicinity of the project. In its final report, the OCR laid out the pilings issue and WDOT's analysis of the issue, as supported by WDNR. It concluded: "The environmental issues raised by the opponents have already been adequately addressed by the environmental assessment done by DOT. Requiring another EA or a full EIS would only serve to delay an important safety project without any likely environmental benefit." R.39, Ex.1027, A.R. at 14112.

On October 24, 2001, WDOT and WDNR representatives attended the follow-up meeting to the September 20, 2001 meeting held by Rep. Jeskewitz regarding the

contamination and environmental effects of the project. One of the Public Communication Records in the record includes a "Discussion Summary" which described the substance of the meeting:

> SURE expert John Thresher's position:
>
> Alleges that groundwater contamination plumes (TCE and Arsenic) are approaching STH 164.
>
> Contends that pilings from new bridges would be a mechanism for contaminated groundwater to enter area wells (offered no proof).
>
> Believes that Waste Management Landfill is source of contamination.
>
> Wants groundwater monitoring wells installed in STH 164 right-of-way to determine if contamination is present.
>
> If contamination is not within right-of-way, pilings will not cause contamination to enter area wells.
>
> WisDNR's position:
>
> Site has been monitored since about 1980. Contamination is present in shallow groundwater.
>
> Mr. Thresher's information is based on 1986 data, which is considered suspect.
>
> Based on existing site conditions, pilings could not be a mechanism for the contaminated groundwater to enter area drinking wells.
>
> There is no proof that contamination is migrating towards STH 164. Appears that concentration of contamination is reducing as expected.

> There is no definitive evidence that Waste Management Landfill is source of contamination.
>
> Don't believe monitoring wells are needed and can't legally make Waste Management install them.
>
> Recommend continued testing of private drinking water wells and replacement if problem occurs.

WisDOT's position:

> Have support from all the required agencies and have followed all environmental requirements.
>
> Concur with WisDNR's position on pilings.
>
> Cited article in ENR Magazine of study done by University of New Orleans that displacement piles would not likely form conduits for contamination transfer (we are using cast-in-place concrete piling – a displacement pile).
>
> Rep. Jeskewitz and Sen. Darling will send letter to WisDOT requesting installation of monitoring wells in STH 164 right-of-way.

A.R. at 10440. In the next "Point Made" section of the Record, it stated: "WisDNR and WisDOT believe there is adequate proof to indicate that contamination has not migrated to the STH 164 right-of-way nor will contamination in excess of Health Advisory Limits ever migrate to the right-of-way. Further, pile driving will not cause migration even if contaminants are present." *Id.*

On November 16, 2001, Mr. Gonyo sent a letter to Terrence Mulcahy, then-Secretary of the WDOT. *Id.* at 10586. This letter discussed a Town of Polk resolution opposing the Ackerville Bridge Project and requested that

the Project be immediately ended. *Id.* A December 3, 2001 letter from Secretary Mulcahy responded by acknowledging the opposition but noting that safety is the primary goal of WDOT and the bridge option provides for the best effectuation of safety and other goals for the Project. *Id.* at 10587-10588.

On December 11, 2001, the WDOT received another inquiry from Wisconsin State Representative Michael (Mickey) Lehman asking whether there was any plan to clear up the contamination plume and whether additional testing was possible. The WDOT responded on December 21, 2001, recognizing the concern but concluding:

> The DNR has stated that the driving of piling into the groundwater will not cause contamination to migrate into area wells. Based on these statements from the DNR, our position is that if drinking water well contamination occurs, it will not have been caused by our project and would fall under the jurisdiction of the DNR. Therefore, I am forwarding your letter to Charles Krohn, Southeast Region Water Leader, DNR, and asking that they respond to your questions, since they are experts on handling groundwater contamination.

Id. at 10575.

On December 13, 2001, the U.S. EPA sent a letter to Mr. Gonyo responding to his letter explaining the "Resolution of the Town of Polk Electors Opposing the Ackerville Bridge" Project and the County J Project. This letter stated that based on the information it had received from WDNR, WDOT and FHWA, U.S. EPA believed the potential contamination issues had been addressed adequately in the respective EA and EIS for these projects. *Id.* at

10477. The letter also responded to Mr. Gonyo's request for a Federal Superfund cleanup of the entire landfill area west of Ackerville, Wisconsin. In that regard, the letter noted that the environmental investigation report that U.S. EPA conducted on the site revealed no direct contact threats to the soil at the site and that there is no observed release of groundwater that can be attributed directly to the site. *Id.* "Therefore, the U.S. EPA did not recommend further investigation of the subject landfill." *Id.*

Another public meeting on the contamination plume was held on January 30, 2002, at which State Representatives and Senators requested installation of monitoring wells in Ackerville. In a February 4, 2002 document entitled "Summary of the Groundwater Contamination in the Ackerville Area Washington County, Wisconsin," Mr. Thresher again concluded that the contamination threatened Ackerville residents and discussed the pilings. On February 26, 2002, a document entitled "Public Health Assessment for Ackerville Area Groundwater" was released by the Wisconsin Department of Health and Family Services, Division of Public Health, on behalf of WDNR, the Washington County Health Department, and the Agency for Toxic Substances and Disease Registery [sic]. The Assessment concluded: "There is no relationship between the proposed bridge construction project and area groundwater quality. The groundwater is 30 feet below the ground surface and will not be affected by the bridge or road construction." R.38, Ex.1039, A.R. at 10154.

On February 27, 2002, then-WDOT Secretary Gene E. Kussart sent letters to the various state Representatives and Senators who had requested testing at the January 30, 2002 meeting, stating: "Although the [WDOT] has conformed to all environmental requirements for this

project and [WDNR] and [FHWA] have indicated that our improvement project will not impact the groundwater, I have decided to accommodate your request." R.39, Ex.1036, A.R. at 10545-10548. These wells were installed by STS Consultants in the vicinity of the Project for the purpose of "determining potential impacts of upgradient groundwater contaminant sources on areas of bridge pile support installation." R.39, Ex.1038, A.R. at 10086. In an April 8, 2002 memorandum to "Files," Mr. Bauman of WDOT noted the wells should be installed before construction and tested within a week of installation and quarterly for two years thereafter. The memo also noted:

> WisDOT intends to turn over the results of all tests to the WisDNR for their use. It is our opinion that the WisDNR will be responsible to pursue and oversee any actions needed in response to the test results. The WisDOT, Dept. of Health and Family Services and the WisDNR all believe this project will not impact the groundwater in the project area whether contamination is present in the right-of-way or not. Therefore, we expect that regardless of what is found in the tested wells the project will not be delayed or changed in any way.

R.39, Ex.1039A, A.R. at 10119. In an e-mail dated April 24, 2002, Mr. Wade of WDOT reached the following conclusion based on the initial sampling results from the new monitoring wells:

> The confirmation of permeable aquifer materials, upward hydraulic gradients, low contaminant concentrations, and lack of any apparent contaminant source in the immediate project area all reinforce our earlier conclusion that the project activities, including the driving of piles, will

> have no significant impact on the continuing migration of the contaminants in the project area. No modification of the highway project should be required.

R.39, Ex.1040, A.R. at 10079. In a May 2, 2002 memorandum from Mr. Fauble of WDNR to Mr. Wade of WDOT, Mr. Fauble stated that, per Mr. Wade's request, he had reviewed the initial monitoring data and that none of the data contradict his and Mr. Czarkowski's August 22, 2000 memo. Specifically, he noted that TCE levels were well below state enforcement standards, there were no detects of arsenic, and there were very low VOC detects.

Construction began on the Project in May of 2002, including the insertion of the pilings. On May 15, 2002, the U.S. EPA sent a letter to U.S. Senator Russ Feingold of Wisconsin concluding that the "U.S. EPA has determined that the Ackerville project will not significantly impact groundwater quality." A.R. at 10474-10475. On June 25, 2002, the U.S. EPA sent "a follow-up letter" to a June 5, 2002 meeting that included Mr. Gonyo, other citizens and U.S. EPA staff. The letter noted that EPA staff "confirmed and reiterated" its position in the June 5th meeting that the "U.S. EPA does not believe that the Ackerville project will significantly alter long-term groundwater quality in this area," and the letter also stated the agency does not believe sufficient reason exists to change its position. R.48 at 2.

By the time Citizens filed this lawsuit on July 3, 2002, 150 of the 177 pilings (84%) necessary for the Project already had been inserted. On November 21, 2002, Mr. Bauman of WDOT sent a memorandum with the new monitoring well results. R.39, Ex.1046 at 1. The memo noted that TCE levels were well below detectable limits,

arsenic levels had increased in two wells but were well below the DNR Prevention Action Limit, and that WDOT continued to believe the Project would not have a significant effect on the groundwater in Ackerville. *Id.*

2. County J/Highway 164 Project (Project # 2748-01-01)

On April 9, 2001, a final Environmental Impact Statement ("EIS") was approved by the FHWA for the County J/Highway 164 Project for distribution to agencies and the public. On March 6, 2002, the FHWA adopted the selected alternative that was set forth in the EIS for "WisDOT Project I.D. 2748-01-01." R.39, Ex.1045 at 12. This alternative "widens County J/WIS 164 on its present alignment, and incorporates the existing roadway as part of the ultimate 4-lane facility." *Id.* at VI. The Project extends for approximately 18 miles and abuts the Ackerville Bridge Project at its northernmost end. *Id.* at IV. The key objectives for this road-widening project include providing for increasing traffic demands and addressing safety concerns due to the traffic and current inadequacies of the roadway. *Id.* at IV-VI.

B. District Court Proceedings

On June 12, 2003, the district court denied Citizens' motion for a preliminary injunction and ruled against Citizens on the merits. Before turning to the merits, the district court determined that the standing requirement was satisfied by at least some of Citizens' individual members, as well as the association itself. It also held that Citizens' claims were not moot or barred by the doctrine of laches because Citizens had filed after 150 of the 177

pilings (84%) necessary for the Ackerville Bridge Project were already in the ground. Both of these issues were thoroughly and correctly analyzed by the district court, and we shall not further discuss them.

As to the merits, the district court first determined that, overall, the defendants had taken the requisite "hard look" at the environmental consequences of the Project. Second, the court held that the defendants had considered sufficiently reasonable alternatives and had "made a fully informed decision to proceed with the alternative involving the overpass structure." R.52 at 54. Finally, the court determined that the defendants made a "reasonable decision in establishing the project termini" and that the Ackerville Bridge Project had not been improperly segmented from the County J/Highway 164 Project. *Id.* at 56.

II

DISCUSSION

A. "Hard Look" at Environmental Consequences

This court's review of agency action under NEPA is governed by the APA. *See Indiana Forest Alliance, Inc. v. United States Forest Serv.,* 325 F.3d 851, 858 (7th Cir. 2003). The APA instructs courts to set aside agency action only if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." 5 U.S.C. § 706(2)(A). Under this standard, our inquiry is "searching and careful" but "the ultimate standard of review is a narrow one." *Marsh v. Oregon Natural Res. Council,* 490 U.S. 360, 378, 104 L. Ed. 2d 377, 109 S. Ct. 1851 (1989) (internal quotations and citations omitted). We only must ask "whether the decision was based on a consideration of the relevant factors and whether there has been a clear

error of judgment." *Id.* "If an agency considers the proper factors and makes a factual determination on whether the environmental impacts are significant or not, that decision implicates substantial agency expertise and is entitled to deference." *Indiana Forest Alliance,* 325 F.3d at 859. In the context of NEPA, arbitrary and capricious review prohibits a court from "substituting its judgment for that of the agency as to the environmental consequences of its actions." *Kleppe v. Sierra Club,* 427 U.S. 390, 410 n.21, 49 L. Ed. 2d 576, 96 S. Ct. 2718 (1976). In fact, "the only role" for a court in applying the arbitrary and capricious standard in the NEPA context "is to insure that the agency has taken a 'hard look' at environmental consequences." *Id.*

NEPA sets forth a broad national commitment to protecting and promoting the environment. *See Robertson v. Methow Valley Citizens Council,* 490 U.S. 332, 349, 104 L. Ed. 2d 351, 109 S. Ct. 1835 (1989). Like the APA, NEPA "does not mandate particular results, but simply prescribes the necessary process. If the adverse environmental effects of the proposed action are adequately identified and evaluated, the agency is not constrained by NEPA from deciding that other values outweigh the environmental costs." *Id.* (internal citations omitted). One process required under NEPA is that all federal agencies must prepare an "environmental impact statement" ("EIS") for "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C); *see also Heartwood, Inc. v. United States Forest Serv.,* 230 F.3d 947, 949 (7th Cir. 2000). This report is "a detailed analysis and study conducted to determine if, or the extent to which, a particular agency action will impact the environment." *Heartwood,* 230 F.3d at 949.

In evaluating whether an EIS is necessary, Council on Environmental Quality ("CEQ") regulations instruct that the term "significantly" in the statute requires consideration of both "context" and "intensity." 40 C.F.R. § 1508.27(a)-(b). Intensity in turn requires agencies to consider, among other factors, "the degree to which the proposed action affects public health and safety"; "the degree to which the effects on the quality of the human environment are likely to be highly controversial"; and "the degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks." *Id.* § 1508.27(b)(2), (4), (5).

These considerations are often spelled out in the preliminary stages of a proposed project in an environmental assessment ("EA"). An EA is a shorter, rough-cut, low-budget EIS which is mandated when, as here, proposed action is neither one normally requiring an EIS nor one categorically excluded from the EIS process. *See* 40 C.F.R. § 1508.9; 23 C.F.R. § 771.115(c); *Indiana Forest Alliance,* 325 F.3d at 856. Among other information, it "provides evidence and analysis that establishes whether or not an EIS or a Finding of No Significant Impact ('FONSI') should be prepared." 40 C.F.R. § 1508.9(a)(1); *see also Rhodes v. Johnson,* 153 F.3d 785, 788 (7th Cir. 1998).

In this case, Citizens alleges that the defendants failed to take a "hard look" at the environmental consequences of the Ackerville Bridge Project and that an EIS is required for the Project under NEPA and its implementing regulations. In assessing these contentions, we must, as a threshold matter, state with precision the question at issue. Both parties agree there are contaminants in the groundwater in the general vicinity of the Ackerville Bridge Project. They disagree as to the source of the

contaminants and the extent of the threat posed by the contaminants. Citizens claims the source is the Waste Management landfill. The defendants are not sure what the precise source is. Citizens claims the levels of contaminants are unsafe. The defendants believe they are not. Regardless of the source and extent of the contaminants, the key question is whether there is a nexus between the Ackerville Bridge Project, which the defendants are implementing and which NEPA and its regulations govern, and the *preexisting* contamination in the general vicinity, which, apart from the Project, NEPA and its regulations do not affect.

In this action, the only possible mechanism by which Citizens claims the Project will exacerbate this preexisting condition is through the bridge pilings. In their view, when driven into the groundwater, the pilings will create a zone of permeability that will allow the contaminants to flow to the private drinking water of Ackerville citizens. Thus, the narrow question before us is whether the pilings needed for the bridge will advance or exacerbate the migration of contaminated water toward private wells in the Ackerville area.[3]

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[3] Citizens puts a great deal of emphasis in its argument on the allegation that the defendants did not adequately determine the source and extent of the contamination, especially the extent of arsenic, before proceeding with a finding of no significant impact and with construction. *See, e.g.*, Appellant's Br. at 28, 31-32, 36-37. As a threshold matter, we note that the defendants did explore the levels of contamination both before and after the April 2000 EA/FONSI enough to determine that there was preexisting contamination, at least in small amounts, and to determine that the Project itself did not threaten to exacerbate the contamination without some mechanism to advance it toward the Ackerville drinking water. *See* R.38, Ex.1003, A.R. at 00002; R.38,

(Continued on following page)

Citizens, through its expert, Mr. Thresher, claim that "the coarse grains along the boundaries of the driven pilings would rotate due to the shearing thereby increasing the porosity, and consequently the permeability, of the sands and gravels near the pilings." Appellant's Br. at 34. This is the principle of dilatancy, and in this case, it means the driving of pilings will create a zone of permeability (a space that chemicals can pass through) around the outside of the pilings that would allow contamination from lower levels to migrate upward and eventually into private drinking wells and water. *Id.* Defendants through their experts at the WDNR disagree and instead believe that the "relatively small increase in vertical groundwater

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Ex.1015, A.R. at 00714; R.38, Ex.1020, A.R. at 12295. Nevertheless, Citizens' argument misses the point. Again, we emphasize that the defendants' liability under NEPA and its implementing regulations rests on a nexus between their Project and the preexisting contamination. If the Project has no significant effect on the contamination, the contamination is still a problem, but it is a problem that does not fall under the jurisdiction of the FHWA and WDOT. Rather, it falls under the U.S. EPA and WDNR which are charged with maintaining the quality of groundwater for our citizens. In fact, both in relation to and apart from this Project, the U.S. EPA and WDNR have been monitoring the contamination and its effect on the groundwater in Ackerville for some time. *See* R.38, Ex.1024, A.R. at 10164-10165; A.R. at 10476-10477.

In sum, NEPA requires agencies to take a "hard look" at the environmental consequences *of their projects. Kleppe v. Sierra Club,* 427 U.S. 390, 410 n.21, 49 L. Ed. 2d 576, 96 S. Ct. 2718 (1976). If an agency's project does not *itself* "significantly" affect the environment, then neither NEPA nor its implementing regulations require an agency to perform an EIS or to remedy a preexisting environmental problem merely because the project happens to take place in the vicinity of that preexisting environmental problem. *See* 42 U.S.C. § 4332(2)(C); 40 C.F.R. § 1508 (discussing "effects" which "are caused *by the action*") (emphasis added).

movement which might be expected along open spaces surrounding even several dozen pilings is insignificant compared to the quantity of natural vertical movement." R.38, Ex.1020, A.R. at 12295. Again, we emphasize that we do not approach this dispute as a panel of environmental experts attempting to decide which party is correct. We only review whether the agencies charged with carrying out this project took a "hard look" at the relevant information and consequences and made an informed judgment.

The April 2000 EA/FONSI for the Ackerville Bridge Project does not contain a specific discussion of the effects of the pilings. Rather, it discusses the required excavation, noting it will not reach the groundwater, and concludes: "The Department has determined that the potential for encountering and impacting hazardous materials during construction of this project does not exist. Therefore, there is no purpose or need for preparation of an EIS." R.38, Ex.1003, A.R. at 00005. Other contemporaneous documents do contain general conclusions that the pilings will have no effect on the contamination. For example, the Addendum to the Phase 1 Report, also released in April of 2000, states without elaboration that it is "unlikely the pilings for the structure supports . . . will cause an impact on plume movement or concentrations." R.38, Ex.1015, A.R. at 00714. Likewise, Mr. Wade, a Hazardous Materials Engineer for WDOT, concluded in a March 14, 2000 letter that "it is also unlikely that project pilings or water detention/infiltration basins will cause an impact on plume movement or concentrations." R.38, Ex.1009, A.R. at 00728. Although based on the evidence in the record, we

believe the defendants knew the pilings would extend into the groundwater when the April 2000 EA/FONSI was issued,[4] there is no "hard look" analysis to support the conclusion reached by the defendants that the pilings would not have a significant effect. Indeed, the defendants appear to acknowledge there was not a "hard look" analysis

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[4] The first, official, public acknowledgment that the pilings would extend into the groundwater was an EMCS report dated February 26, 2001. However, the defendants explain that they had assumed before the issuance of the April 2000 EA/FONSI that the pilings would extend below the groundwater, and though ambiguous, the most plausible inference from the record is that they in fact made that assumption. For example, the defendants asked the question in a "Fact Sheet/Topics of Concern" dated February 15, 2000: "If there is contamination in the shallow groundwater, couldn't the structure pilings create a 'channel' to contaminate [sic] the deep groundwater where our drinking water comes from?" R.38, Ex.1008, A.R. at 00146. In a March 24, 2000 letter from Ken Wade of WDOT to EMCS, Mr. Wade stated:

> The water table for this region is approximately 30 feet below the ground surface. If construction plans for the footings require only 4 to 5 feet of excavation, it is very unlikely that contaminated groundwater will impact the project.
>
> *It is also unlikely* that project pilings . . . will cause an impact on plume movement or concentrations.

R.38, Ex.1009, A.R. at 00728 (emphasis added). This language is mirrored in the April 2000 Addendum. R.38, Ex.1015, A.R. at 00714. Furthermore, just months after the issuance of the April 2000 EA/FONSI, Mr. Gonyo wrote a letter to the FHWA requesting reconsideration of the FONSI, and this letter stated: "The pilings will have to be driven into and below the contaminated groundwater table." R.38, Ex.1017 at 2. Finally, the WDNR was involved in this Project well before the issuance of the April 2000 EA/FONSI, *see* R.38, Ex.1003, A.R. at 00005 (Basic Sheet 2) (discussing "extensive coordination" with the WDNR in finding no significant impact), and Mr. Fauble of WDNR later noted in a correspondence: "When I first reviewed the environmental concerns regarding this project as part of the team here at DNR, I was aware that pilings would be driven below depths of 30 feet, which is where the groundwater occurs." R.39, Ex.1031, A.R. at 13827.

of the effect of the pilings in April of 2000; instead, the defendants rely on the post-EA/FONSI, August 22, 2000 memo of their experts at the WDNR as the basis for their "hard look." *See* R.29 at 11 (defendants' answers to district court's questions) ("The specific question as to how the pilings would affect groundwater and more particularly, the movement of arsenic and TCE was *fully addressed after the FONSI* on a number of occasions by various persons.") (emphasis added); Appellees' Br. at 49 (stating that "the timing of the final determination of the depth that the pilings would extend into the ground is of little relevance based upon the findings the WDNR reached in its August 22, 2000, memorandum").

After the issuance of the final EA/FONSI, Mr. Gonyo requested reconsideration of the defendants' decision in his July 7, 2000 letter to the FHWA. One concern specifically raised is that "the pilings will have to be driven into and below the contaminated groundwater table." R.38, Ex.1017 at 2. The FHWA and WDOT were responsive to Mr. Gonyo's request and solicited the help of the experts at the WDNR in reevaluating the Project's impacts, including the effect of driving the pilings into the groundwater table, in order to respond to Mr. Gonyo. This exchange resulted in the August 22, 2000 WDNR memorandum authored by Mr. Czarkowski and Mr. Fauble, which states that "driving pilings to depths greater than 30 feet could potentially encounter contaminated groundwater." R.38, Ex.1020, A.R. at 12296. However, the memo goes on to conclude that the "relatively small increase in vertical groundwater movement which might be expected along open spaces surrounding even several dozen pilings is insignificant compared to the quantity of natural vertical movement." *Id.* at 12297. As required by NEPA, this conclusion was

"based on a consideration of the relevant factors," *Marsh v. Oregon Natural Res. Council,* 490 U.S. 360, 378, 104 L. Ed. 2d 377, 109 S. Ct. 1851 (1989) (internal quotations and citations omitted), specifically, the makeup of the soil into which the pilings were to be driven, R.38, Ex.1020, A.R. at 12296. It also was not "clear error of judgment." *Marsh,* 490 U.S. at 378 (internal quotations and citations omitted). Finally, the conclusion was arrived at by the defendants' experts, on which they were entitled to rely to the exclusion of Citizens' expert. *Id.* ("When specialists express conflicting views, an agency must have discretion to rely on the reasonable opinions of its own qualified experts even if, as an original matter, a court might find contrary views more persuasive."). At this point, the defendants had taken a "hard look" and were in full compliance with NEPA and its regulations.

Although we could stop here, we have gone to great lengths in reciting the facts to demonstrate that from August of 2000 to the beginning of the construction in May of 2002, the defendants did not ignore Citizens' concerns. Rather, the defendants attended meetings with state legislators in which Citizens' representatives expressed their concerns, responded to Citizens' various requests for information and reconsideration, ultimately agreed to install private monitoring wells to study the contamination despite the belief the Project would have no significant impact on the contamination, and reviewed, and had the WDNR review, the results of the initial monitoring from the newly installed wells and any effects those results might have on the Project. In addressing Citizens' concerns, the defendants and WDNR also worked with other agencies including the U.S. EPA, Wisconsin OCR, and the Wisconsin Department of Health and Family

Services, all of which confirmed the defendants' conclusion that the Project would not significantly affect the groundwater contamination. To be sure, the defendants did not change their position as result of Citizens' requests and challenges, but they were not required to do so. *See Robertson v. Methow Valley Citizens Council,* 490 U.S. 332, 350, 104 L. Ed. 2d 351, 109 S. Ct. 1835 (1989) (stating that NEPA "simply prescribes the necessary process" but "itself does not mandate particular results" (citations omitted)).

In taking a hard look at the environmental consequences, the the [sic] defendants also made a reasoned determination that an EIS was not required. As noted previously, an EIS is only required for "major Federal actions *significantly* affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C) (emphasis added). According to CEQ regulations, "significantly" requires an agency to consider the "context" and "intensity" of a project's environmental consequences. *See* 40 C.F.R. § 1508.27(a)-(b). Citizens claims the defendants failed to consider three factors that CEQ regulations instruct agencies to "consider[]" under the intensity prong. *See id.* § 1508.27(b). First, it claims the defendants failed to consider "the degree to which the proposed action affects public health and safety." *Id.* § 1508.27(b)(2). The defendants, however, did consider this factor but found the Project, and specific to this litigation, the pilings, would have an insignificant effect. This factor must also be read in the context of the regulation's instruction that agencies consider "[i]mpacts that may be both beneficial and adverse." *Id.* § 1508.27(b)(1). The defendants found not only that the negative environmental impacts of the Project were insignificant, but also that the Ackerville Bridge

Project was the best way to solve serious safety problems with the current roadway facility.

The defendants also did not fail to consider "the degree to which the effects on the quality of the human environment are likely to be highly controversial." *Id.* § 1508.27(b)(4). Citizens has met its initial burden of establishing that the Project was highly controversial, as we recently defined that term in *Indiana Forest Alliance, Inc. v. United States Forest Service,* 325 F.3d 851, 858 (7th Cir. 2003) ("This factor considers whether there is a substantial dispute about the size, nature or effect of an action in the relevant community."). However, that is only the first step in the analysis. As we further explained in *Indiana Forest Alliance,* if the plaintiff meets the initial burden,

> the agency must consider the dispute and address the concerns in its final decision. This two-step approach recognizes that as long as the agency has taken a "hard look" at the relevant issues involved in the preparation of an EIS and satisfactorily explained its subsequent decision, the agency decision should not be set aside.

Id. at 858. In this case, the defendants did just that. *See* R.38, Ex.1020, A.R. at 12295-12296; R.38, Ex.1022, A.R. at 06225. The mere fact that there is still disagreement or that Citizens' expert disagrees with the defendants' experts does not render the defendants out of compliance under this factor. *See Indiana Forest Alliance,* 325 F.3d at 861 (citing multiple cases for the proposition that scientific dispute does not render an agency's action arbitrary and capricious).

Finally, the defendants considered "the degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks." 40 C.F.R. § 1508.27(b)(5). Although they acknowledged uncertainty as to the *source and extent of the threat of the contaminants* to the Ackerville area, they found with certainty that the *Project's effects* on the contamination and environment were insignificant. That conclusion was informed and reasoned, and thus cannot be second-guessed. *See Marsh,* 490 U.S. at 378. In summary, we hold that the defendants took a "hard look" at the environmental consequences and in doing so, made an informed and reasoned determination that no EIS was required for the Project.

Before moving on, we must address one last contention by Citizens. Citizens argues that this analysis is faulty because, temporally, our "hard look" analysis should extend only to April of 2000, when the defendants formally issued the EA/FONSI. The defendants did not stop with the issuance of the EA/FONSI, however, and we believe neither should our analysis. First, we do not believe this runs afoul of the administrative record requirement. "The focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." *Camp v. Pitts,* 411 U.S. 138, 142, 36 L. Ed. 2d 106, 93 S. Ct. 1241 (1973). The "hard look" inquiry is focused on "the full administrative record that was before the Secretary *at the time he made his decision." Citizens to Preserve Overton Park, Inc. v. Volpe,* 401 U.S. 402, 420, 28 L. Ed. 2d 136, 91 S. Ct. 814 (1971) (emphasis added), *overruled on other grounds by Califano v. Sanders,* 430 U.S. 99, 105, 51 L. Ed. 2d 192, 97 S. Ct. 980 (1977). Although the *formal* "decision" of no

significant impact was made at the time of the April 2000 EA/FONSI in this case, the defendants reconsidered their position pursuant to the July 7, 2000 request of Mr. Gonyo. With the analysis of the experts at the WDNR, as memorialized in the August 22, 2000 memo, the defendants took a "hard look" at the consequences of the pilings and made a further "decision" that the EA/FONSI was valid and thus there was no need to withdraw the documents. Mr. Madrzak of the FHWA e-mailed Mr. Tufts of the FHWA, the addressee of Mr. Gonyo's request, following completion of the August 22, 2000 memo: "The DNR note [August 22, 2000 memo] confirms the information contained in the revisions to the Environmental Assessment. The FONSI remains valid despite Mr. Gonyo's objections. We will respond accordingly to his request for FHWA to withdraw approval of the FONSI." R.11, Ex.5 (attached e-mail).

The purpose of confining judicial review to the administrative record is to ensure that agencies adequately evaluate their proposed course of action *before* they act and do not simply attempt to justify rash, uniformed actions through "'*post hoc*' rationalizations" once they are aware they are being sued. *Citizens to Preserve Overton Park,* 401 U.S. at 419 (quoting *Burlington Truck Lines v. United States,* 371 U.S. 156, 168-69, 9 L. Ed. 2d 207, 83 S. Ct. 239 (1962)). The defendants in this case did not begin construction until May of 2002 and were not informed they were being sued until about the same time. *See* R.52 at 40-41. Therefore, the documents in the record that were developed in the months following the issuance of the April 2000 EA/FONSI, including the August 22, 2000 memo, were analyzed approximately a year and a half before the defendants even knew they were being sued and took the action, the construction, in dispute.

These documents establish that in reconsidering the decision to release the EA/FONSI, the defendants did indeed take a "hard look" at the possibility of increased contamination caused by the pilings. This is not the kind of post-hoc rationalization the Supreme Court has counseled against through the administrative record requirement. *See Citizens to Preserve Overton Park,* 401 U.S. at 419 (discussing the invalidity of affidavits prepared for litigation). To now ignore the analysis in the months subsequent to the formal EA/FONSI would not only require us to elevate form over substance, but it would also require us to ignore the fundamental purpose of NEPA, to ensure that agencies consider the environmental consequences of their actions before they act, which was satisfied in this case. *See Marsh,* 490 U.S. at 371.

Beyond the relevant administrative record, our position might be criticized for looking past the date on which the defendants officially stamped the EA/FONSI because these documents are intended to be the culmination of an agency's environmental assessment. *Cf. Southwest Williamson County Cmty. Ass'n v. Slater,* 976 F. Supp. 1119, 1123 (M.D. Tenn. 1997) (finding that the issuance of an EIS is a final agency action), *aff'd in part and vacated in part,* 173 F.3d 1033 (6th Cir. 1999). NEPA and its regulations require agencies to take a "hard look" at the "significance" of the consequences of their actions before issuing an EA/FONSI, *see* 42 U.S.C. § 4332(2)(C), but also contemplate the reality that, after the formal issuance of an EIS or EA/FONSI, it is often the case that new information comes to light or the project changes. *See Marsh,* 490 U.S. at 370-84 (discussing what is required of an agency under the regulations when a project changes or new information comes to light after the formal issuance of

an EIS). Here, we have an analogous situation. A known issue came into sharper focus after the formal environmental documents were issued. The defendants apparently had considered the effect of driving the pilings into and below the groundwater table before the April 2000 EA/FONSI, and had concluded that the pilings would have no effect on the contamination. However, when Mr. Gonyo requested reconsideration of the FONSI, the full import of the issue became clear, and the defendants did a reevaluation, specifically analyzing the effect of the pilings.

In this regard, the Supreme Court has instructed that "NEPA does require that agencies take a 'hard look' at the environmental effects of their planned action, even after a proposal has received initial approval." *See Marsh,* 490 U.S. at 374. FHWA regulations implementing NEPA accordingly require that "after approval of the . . . FONSI . . . , the applicant shall consult with the Administration prior to requesting any major approvals or grants to establish whether or not the approved environmental document . . . remains valid for the requested Administration action." 23 C.F.R. § 771.129(c). As our analysis above demonstrates, the defendants in this case took a "hard look" at the environmental effects of the Project, specifically, the pilings, in the months following the formal issuance of the EA/FONSI, and determined the previous EA/FONSI remained valid. This action put them in substantial compliance with NEPA.

Not only are agencies required to reevaluate their original documents, but sometimes they are also required to supplement formally the prior environmental documents. NEPA itself does not expressly address post-decision supplements to an EA/FONSI, and neither do the implementing regulations. The regulations do discuss

when an EIS must be formally supplemented, and the Supreme Court has elaborated on this requirement. *See Marsh,* 490 U.S. at 370-84; 40 C.F.R. § 1502.9(c); 23 C.F.R. § 771.130. Nevertheless, 23 C.F.R. § 771.129(c), quoted above, necessarily requires that an inadequate FONSI be formally supplemented if it no longer "remains valid." *Id.* In this case, the defendants determined that the impacts of the pilings were insignificant and that the EA/FONSI remained valid; thus, no supplementation was required. *See Marsh,* 490 U.S. at 385 ("Having [taken a 'hard look' at the proffered evidence] and having determined based on careful scientific analysis that the new information was of exaggerated importance, the Corps acted within the dictates of NEPA in concluding that supplementation was unnecessary."); *Price Rd. Neighborhood Ass'n, Inc. v. United States DOT,* 113 F.3d 1505, 1510 (9th Cir. 1997) (finding supplementation to the EA/FONSI unnecessary when the FHWA and Arizona Department of Transportation reevaluation revealed there were no "discernable" differences in environmental effects from the change in the project); *Vine Street Concerned Citizens, Inc. v. Dole,* 630 F. Supp. 24, 29 (E.D. Pa. 1985) ("The projected increase in the Expressway traffic is not quantitatively or qualitatively significantly different from what was considered in the FEIS"; therefore, no formal supplementation is required.). Furthermore, we agree with the district court that the defendants, in effect, created a de facto supplement to the EA, which was the basis of their "decision" that the FONSI was still valid. *See Lake Region Legal Defense Fund, Inc. v. Slater,* 986 F. Supp. 1169, 1196 (N.D. Iowa 1997) (finding that although a "formal 'supplemental EA' has not been prepared in this case," "the administrative record indicates that the defendants have continued to review the impacts associated with changed conditions in

the Highway 71 project"). Finally, we note that to remand with an order that the defendants formally supplement the EA and republish the FONSI at this late date, when NEPA's letter and spirit have been complied with, when the pilings are in the ground, and when the bridge is up, would be futile. *See Cronin v. United States Dep't of Agric.*, 919 F.2d 439, 443 (7th Cir. 1990) (noting that a court need not remand a case if doing so would be futile).

B. Reasonable Alternatives

NEPA requires that agencies "study, develop, and describe appropriate alternatives" to major federal projects. 42 U.S.C. § 4332(2)(C)(iii) & (2)(E). The inquiry into consideration of reasonable alternatives is "independent of the question of environmental impact statements, and operative even if the agency finds no significant environmental impact." *River Rd. Alliance, Inc. v. Corps of Eng'rs of United States Army,* 764 F.2d 445, 452 (7th Cir. 1985). This does not mean, however, that courts should ignore the context in which alternatives are considered. When, as here, an agency makes an informed decision that the environmental impact will be small, a view which we are required to accord deference, a "less extensive" search is required. *Id.* ("The smaller the impact, the less extensive a search for alternatives can the agency reasonably be required to conduct."). Some courts frame this sliding-scale approach as a "rule of reason" inquiry, which governs "both *which* alternatives the agency must discuss, and the *extent* to which it must discuss them." *See Citizens Against Burlington, Inc. v. Busey,* 290 U.S. App. D.C. 371, 938 F.2d 190, 195 (D.C. Cir. 1991) (quoting *Alaska v. Andrus,* 188 U.S. App. D.C. 202, 580 F.2d 465, 475 (D.C. Cir. 1978)). Again, our review is not of the agency's substantive judgment, but of

the sufficiency of the agency's consideration of the reasonable alternatives. *See Methow Valley,* 490 U.S. at 350 ("It is now well settled that NEPA itself does not mandate particular results, but simply prescribes the necessary process." (citations omitted)).

We have stated that logically and legally, an agency is required to address three questions in considering alternatives. *See Simmons v. United States Army Corps of Eng'rs,* 120 F.3d 664, 668 (7th Cir. 1997). "First, what is the purpose of the proposed project (major federal action)? Second, given that purpose, what are the reasonable alternatives to the project? And third, to what extent should the agency explore each particular reasonable alternative?" *Id.*

The defendants set forth three purposes for the Ackerville Bridge Project. The "primary purpose" is to address safety considerations flowing from the layout of the roads and the close proximity of the railroads. R.38, Ex.1003, A.R. at 00004. Another purpose is to bring the existing facility into compliance with State Trunk Highway standards, which govern the necessary requirements for a road to support truck traffic. *Id.* at 00013. A "secondary purpose" is to provide for future expansion of the roadways due to increasing traffic in the region. *Id.* at 00004.

Given these three purposes, we hold the defendants considered a sufficient number of reasonable alternatives and explored them to the extent necessary for this Project. *See Simmons,* 120 F.3d at 668. In its "Summary of the alternatives considered" in the EA/FONSI, the defendants first considered a "No Action" alternative, under which no action would be taken other than routine maintenance.

R.38, Ex.1003, A.R. at 00013. However, they concluded this alternative did not address any of the concerns with the existing roadway facility. The defendants also discussed their "Recommended Alternative," which was eventually implemented. *Id.* Finally, they considered four "Other Alternatives," but found them all lacking for various reasons, including safety concerns and cost-efficiency. *Id.*

The defendants also specifically responded to the alternative Citizens urged, and which Citizens now claims was rejected for pretextual reasons. Citizens' proposal included re-aligning the intersection at STH 164 and STH 175 to a right angle, reducing the steep hills along STH 164/STH 175 to a right angle, adding traffic gates at the railroad crossings, and adding signals at the STH 164/STH 175 intersection. Citizens alleges that this option was rejected because the defendants' true primary motive for some time has been a "desire to preserve a corridor for a possible future 4-lane roadway." Appellant's Br. at 42 (quoting A.R. at 00004). This purpose is why the defendants opted for building an overpass structure instead of opting for its proposal, which would adequately address the safety concerns. *Id.*

As an initial matter, this view of pretextual motive is not supported in the record. The EA/FONSI states:

> The main purpose and immediate need for the STH 175 to STH 60 project is to correct a safety problem at the STH 164/175 intersection, correct a hazardous at-grade train crossing on STH 164 by building a bridge to cross over the train tracks and reconstruct the existing 2-land roadway to correct a deteriorating pavement situation. A

> secondary focus of the project is to preserve a corridor for a possible future 4-lane roadway.

R.38, Ex.1003, A.R. at 00004. This prioritization is confirmed in multiple other documents. For example, the defendants performed an "Accident Analysis Report," which analyzes the safety concerns necessitating this Project and provides ample statistical data on the safety issues. R.38, Ex.1004, A.R. at 05409-05415.

Regardless, the defendants specifically analyzed Citizens' proposal and found it lacking with respect to all three purposes of the Project:

> Substantial impacts to the town of Ackerville would occur by re-aligning either roadway. Adding gates at the railroad crossings would not address the fact that there are currently long delays due to the amount of train traffic here. This will only worsen in the future since Wisconsin Central Limited has plans to double the train traffic on these lines. The installation of signals does not guarantee safety. The close proximity of the railroad tracks to the intersection may cause traffic to back-up past the tracks while waiting to clear the intersection. This proposal does not address the need for the project in regards to state trunk highway standards. The 11% grade just north of the intersection, inadequate shoulder widths, poor pavement structure, and the inadequate stopping sight distances throughout the project are all substantial features of this highway which are not addressed. Also, the need for future expansion to 4 lanes has not been addressed.

R.38, Ex.1003, A.R. at 00006.

Given that the environmental impacts of this Project were found by the defendants to be insignificant, the defendants satisfied the requirement that they consider reasonable alternatives. We are not entitled to second-guess the defendants' reasoned and informed determination that the public interest, including the public safety, would be better served if the preferred alternative were built.

C. Segmentation

Segmentation, as the name suggests, addresses an agency's decision on where one project ends and another begins. "In order to ensure meaningful evaluation of alternatives and to avoid commitments to transportation improvements before they are fully evaluated." FHWA regulations require that each action evaluated in an EIS or FONSI:

> (1) Connect logical termini and be of sufficient length to address environmental matters on a broad scope;
>
> (2) Have independent utility or independent significance, i.e., be usable and be a reasonable expenditure even if no additional transportation improvements are made; and
>
> (3) Not restrict consideration of alternatives for other reasonably foreseeable transportation improvements.

23 C.F.R. § 771.111(f)(1)-(3).

"Piecemealing" or "segmentation," which Citizens alleges occurred in this case, "allows an agency to avoid the NEPA requirement that an EIS be prepared for all

major federal action with significant environmental impacts by segmenting an overall plan into smaller parts involving action with less significant environmental effects." *City of West Chicago v. United States Nuclear Regulatory Comm'n,* 701 F.2d 632, 650 (7th Cir. 1983). The purpose of segmentation review is not for a court to decide whether or not an agency drew the correct lines when putting the boundaries on its projects. Rather, "segmentation analysis functions to weed out projects which are pretextually segmented, *and* for which there is no independent reason to exist. When the segmentation project has *no* independent justification, no life of its own, or is simply illogical when viewed in isolation, the segmentation will be held invalid." *Save Barton Creek Ass'n v. FHWA,* 950 F.2d 1129, 1139 (5th Cir. 1992) (internal quotations and citations omitted). Thus, we are looking for agency action that ignored, or gave insufficient weight to, the factors set out in the regulations in an attempt to avoid the requirements of NEPA.

Citizens claims the County J/Highway 164 Project was impermissibly segmented from the Ackerville Bridge Project to allow the defendants to avoid performing an EIS on the Ackerville Bridge Project. The County J/Highway 164 Project is 18.1 miles and its northernmost point abuts the Ackerville Bridge Project, which is 1.3 miles. Thus, Citizens asserts, of the 19.4 miles of the highway being worked on, only 1.3 miles will not be the subject of an EIS, and this 1.3 miles includes the contamination plume. Furthermore, Citizens submits that the "logical terminus is Hwy. 60, not an artificial part on a hilltop 1.3 miles south of Hwy. 60." Appellant's Br. at 43.

We agree with the district court that these arguments are not persuasive. In the EA/FONSI, the defendants

explicitly considered the three criteria for segmentation set out in 23 C.F.R. § 771.111, and gave a reasoned justification of how their segmentation fit each factor. As to logical termini, the defendants explained that "since the need to bridge the train tracks is the driving force behind this project," the south termini for the Project was established just beyond the bridge touchdown point. The north termini was established as the STH 60/STH 164 intersection. *See* R.38, Ex.1003, A.R. at 00004. Citizens argues that the Ackerville Bridge Project is really just part of the road-widening plan being implemented by the County J/Highway 164 Project. However, as we noted above, we do not find that the record supports the contention that the defendants have been pretextually more concerned with road-widening than safety. Indeed, as constructed, the bridge meets the immediate safety concerns at this critical juncture of railroad and vehicular traffic. It would be compatible with the roadway expansion of the County J/Highway 164 Project only after modification. Furthermore, our review is not to determine whether the defendants made the best choice, but only whether they made a choice that was informed and reasonable. *See Save Barton Creek,* 950 F.2d at 1140.

The second factor, independent utility, is the most important factor in highway cases such as this. *See id.* ("In the context of a highway within a single metropolitan area, as the case at issue – as opposed to projects joining cities – courts have focused more on the factor of 'independent utility.'" (citations omitted)). With respect to this factor, the EA/FONSI pointed out that neither the bridge construction project, with its safety focus, or the County J/Highway 164 Project, with its expansion focus, require the construction of any other projects to be usable.

Finally, as to the third factor, restriction of alternatives, the Ackerville Bridge Project contemplates, rather than restricts, future roadway projects, including the possibility of a four-lane project if found to be needed. *See* R.38, Ex.1003, A.R. at 00004. Indeed, making space for future expansion was a "secondary purpose" for the Project in the first place.

In sum, the defendants analyzed the relevant factors set out in 23 C.F.R. § 771.111(f)(1)-(3), and came to a reasoned conclusion. There is also no real evidence to support pretextual motive. Accordingly, we hold there was no improper segmentation in this case. *See Save Barton Creek,* 950 F.2d at 1139.

Conclusion

For the foregoing reasons, we affirm the judgment of the district court.

AFFIRMED

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WISCONSIN

HIGHWAY J CITIZENS GROUP,

Plaintiff,

v. Case No. 02-C-0662

NORMAN MINETA, in his capacity as Secretary United States Department of Transportation; FREDERICK WRIGHT, in his capacity as Executive Director, Federal Highway Administration; THOMAS E. CARLSEN, in his capacity as Acting Secretary, Wisconsin Department of Transportation,

Defendants.

DECISION AND ORDER DENYING PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION, DENYING PLAINTIFF'S CLAIMS ON THE MERITS, GRANTING DEFENDANTS' MOTION REQUESTING THE DENIAL OF THE RELIEF PLAINTIFF SEEKS, AND DISMISSING CASE

The Highway J. Citizens Group filed this action under the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 et. seq., challenging defendants' Ackerville Bridge/ Lovers Lane Project and County J/Highway 164 Project. Plaintiff argues that a "contaminated plume of arsenic and tricholethylene [sic] (TCE) is migrating" southeast from the closed Wisconsin-Polk Landfill toward the Ackerville bridge site and western Ackerville where members of the plaintiff organization live. According to plaintiff, driving

bridge support pilings 70-80 feet into the ground disturbs the soil, thereby creating a conduit for the vertical migration of contaminated groundwater. In addition, plaintiff contends that it was improper for the defendants to segment the Ackerville Bridge/Lovers Lane Reconstruction project from the Highway 164 roadwidening project. Plaintiff asks the court to find a NEPA violation, and to direct the defendants to prepare an Environmental Impact Study (EIS) for the Ackerville Bridge/Lover's Lane project and a Supplemental EIS for the County J/Highway 164 Project. Furthermore, plaintiff seeks the issuance of a preliminary and permanent injunction requiring defendants to cut the bridge pilings off at ground level, grout along the length of the piles, and return the area to the natural elevation before bridge construction.

STANDARDS OF REVIEW

Injunctions

When considering whether to grant a preliminary injunction, the court must first consider "whether the moving party has demonstrated: 1) a reasonable likelihood of success on the merits, and 2) no adequate remedy at law and irreparable harm if preliminary relief is denied. If the moving party has demonstrated those items to the satisfaction of the court, then it must then look at: 3) the irreparable harm the non-moving party will suffer if the injunction is granted balanced against the irreparable harm the moving party will suffer if the injunction is denied, and 4) the public interest, i.e., the effect that granting or denying the injunction will have on non-parties." *Aircraft Owners & Pilots Ass'n v. Hinson*, 102 F.3d 1421, 1424-25 (7th Cir. 1996) (internal citations and

quotation marks omitted). The Seventh Circuit of Appeals had adopted a sliding scale approach where the greater the movant's chances of success on the merits, the less the movant must show that the balance of hardships tips in the movant's favor. *Ty, Inc. v. Jones Group*, 237 F.3d 891, 895 (7th Cir. 2001).

If the court finds a procedural violation with respect to the Ackerville Bridge/Lovers Lane Project, it is not imperative that an injunction issue. In NEPA cases, traditional equity standards govern whether or not to grant injunctive relief. *See State of Wis. Weinberger*, 745 F.2d 412, 426 (7th Cir. 1984). Relief must be tailored to fit the particulars of the case, and the environmental concerns of NEPA must be balanced against the larger interests of society that might be affected adversely by an overly broad injunction. The court must "consider the degree to which the NEPA interest would, in fact, be served by an injunction, [as well as] the efficacy of other forms of relief. . . . " *Id.*

Further, a preliminary injunction is not necessarily appropriate on review of an administrative record, where the ultimate relief sought is a permanent injunction and the record is complete. *Cronin v. U.S. Dept. of Agriculture*, 919 F.2d 439, 444-445 (7th Cir. 1990) ("[I]f the two stages are collapsed into one because there will never be a fuller hearing – then considerations of irreparable harms are out the window and the only question is whether the plaintiff is entitled to an injunction, period.") Because the briefing on the merits is complete, the court will deny the request for a preliminary injunction and consolidate the court's decision on the permanent injunction into its decision on the merits.

NEPA

NEPA is the "basic national charter for protection of the environment." 40 C.F.R. § 1500.1(c).[1] It "was enacted to regulate government activity that significantly impacts the environment and 'to help public officials make decisions that are based on an understanding of environmental consequences, and take actions that protect, restore, and enhance the environment.'" *Heartwood, Inc. v. United States Forest Serv.*, 230 F.3d 947, 949 (7th Cir. 2000) (internal citations and quotation marks omitted). To those ends, NEPA establishes procedures that federal agencies must follow when undertaking significant projects. *See* 42 U.S.C. § 4332(2)(C). Under NEPA, agencies proposing "major Federal actions significantly affecting the quality of the human environment" must prepare a detailed EIS discussing the proposed action and its environmental effects. *See* 42 U.S.C. § 4332(2)(C).

In order to determine whether the proposed action will significantly affect the quality of the human environment, and thus whether the EIS is necessary, the agency must prepare an Environmental Assessment (EA). *See* 40 C.F.R. § 1501.4(2)(b); 23 C.F.R. § 771.119. An EA is a brief,

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[1] The Council on Environmental Quality (CEQ) administers NEPA and has promulgated regulations for that purpose. 42 U.S.C. §§ 4342, 4344(3). These regulations are binding on federal agencies, *see Heartwood, Inc.*, 230 F.3d at 949, and are entitled to "substantial deference" by the courts, *Marsh v. Or. Natural Resources Council*, 490 U.S. 360, 372 (1989). Individual agencies have promulgated their own regulations to supplement the CEQ regulations. *See* 40 C.F.R. § 1507.3. The Federal Highway Administration's (FHWA) regulations implementing NEPA are applicable here, *see* 23 C.F.R. § 771.101; and the court will cite to both CEQ's and FWHA's regulations.

public document describing the proposed project and identifying its potential social, economic, or environmental impacts, alternatives and other environmental reviews which the agency should perform concurrently. 23 C.F.R. § 771.119(b), (d); *see also River Rd. Alliance, Inc. v. Corps of Eng'rs of United States Army*, 764 F.2d 445, 449 (7th Cir. 1985) ("The purpose of an environmental assessment is to determine whether there is enough likelihood of significant environmental consequences to justify the time and expense of preparing an environmental impact statement."). It has been described as a "rough-cut, low-budget environmental impact statement designed to show whether a full-fledged environmental impact statement – which is very costly and time-consuming to prepare and has been the kiss of death to many a federal project – is necessary." *Cronin*, 919 F.2d at 443. If the agency finds that the action will have no major or significant impact, the agency prepares a Finding of No Significant Impact (FONSI). 40 C.F.R. § 1508.13; 23 C.F.R. § 771.121(a). The Federal Highway Administration (FHWA), the federal agency in this case, has delegated the initial duty to perform many of these tasks to its funding applicants, here the Wisconsin Department of Transportation (WDOT). *See* 23 C.F.R. § 771.119.

APA

Review of this action is governed by the Administrative Procedures Act (APA), under which courts must set aside agency decisions found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." 5 U.S.C. § 706(2)(A); *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775, 802, 98 S. Ct. 2096, 56 L. Ed. 2d 697 (1978). To determine whether an

agency action is arbitrary or capricious, the court considers "whether the decision was based on a consideration of the relevant factors and whether there has been clear error of judgment." *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 378, 109 S. Ct. 1851, 104 L. Ed. 2d 377 (1989) (citations omitted). The court must be satisfied that the agency "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 103 S. Ct. 2856, 77 L. Ed. 2d 443 (1983). If an agency considers the proper factors and makes a factual determination whether the environmental impacts are significant or not, that decision implicates substantial agency expertise and is entitled to deference. *Marsh*, at 377, 109 S. Ct. at 1861; *see also Greenpeace Action v. Franklin*, 14 F.3d 1324, 1330 (9th Cir. 1992). Pursuant to this deferential standard, reviewing courts should not substitute their judgments for those of an agency as to the environmental consequences of its actions. *Kleppe v. Sierra Club*, 427 U.S. 390, 410, n. 21, 96 S. Ct. 2718, 49 L. Ed. 2d 576 (1976). Consequently, the standard of review when examining an agency's decision under NEPA is narrow. *See Marsh*, 490 U.S. at 378, 109 S. Ct. at 1861.

FINDINGS OF FACT

Plaintiff commenced this action pursuant to the APA, NEPA, CEQ, and the Wisconsin Environmental Policy Act (WEPA), § 1.11 Wis. Stat. and Wis. Adm. Code Ch. TRAN 400 *et seq.* The complaint, filed July 3, 2002, asks the court to: (1) enjoin the defendants from proceeding with the Ackerville Bridge/Lovers Lane Reconstruction project 2748-01-00, until

they have determined the location and extent of the contaminant plume; (2) to mandatorily direct the defendants to pump grout where any piles have presently been driven to seal the areas of distributed soil around the piles; (3) to require the defendants to perform an EIS for the Ackerville Bridge/Lovers Lane Reconstruction portion of the project; (4) to require defendants to prepare a supplemental EIS for all of the County J/Highway 164 project, including that portion consisting of the Ackerville Bridge/Lovers Lane Reconstruction project; (5) to enjoin the defendants from widening County J/Highway 164 from I-94 in Waukesha County to STH 60 in Washington County from two lanes to four lanes; and (6) to enjoin defendants from realigning Lovers Lane and from changing the present alignment, except to improve the pavement and add shoulders without moving the road.

A. Project 2748-01-00

There are two projects at issue in this litigation, and both are considered major federal actions. The first is identified Project I.D. 2748-01-00. An (EA) for Project 2748-01-00 was signed between October 29, 1999, and December 12, 1999. (Ex. 1003; R. 0011-00075) The project is summarized as follows:

1. Description of the Proposed Action.

> The Wisconsin Department of Transportation has acquired jurisdiction of Lovers Lane Road as part of a jurisdictional transfer involving County Highway J in Washington and Waukesha Counties. Currently, Lovers Lane Road does not meet standards for a State Trunk Highway.

The proposed action includes reconstruction of Lovers Lane Road from a point 0.8 km (0.5 mi) south of State Highway 175 to State Highway 60 (see project location map – exhibit 1 and project layout – exhibit 2). The southern .97 km (0.60 mi) is proposed to be constructed with a rural section (shoulder and ditches) on the existing alignment. The northern 1.2 km (0.74 mi) would be constructed with an urban section (curb and gutter) offset from the existing alignment 8.22 m (27 ft) to the east. Right of Way would be acquired for future expansion to a four lane roadway with future lanes being added to the west side of the proposed two lanes when warranted. The impacts associated with the ultimate 4-lane roadway have been analyzed in this Environmental Assessment.

A new road (Foxboro Lane Extension) is proposed to be built in the northwest quadrant of STH 164 and STH 175 to connect the two roadways. Sherman Road and Fond du Lac Drive would also be connected along the southern railroads right-of-way.

An overpass structure is proposed to be built at the Wisconsin Central Limited and the Wisconsin Central Limited and the Wisconsin Southern Railroads in order to remove the exiting at-grade crossings. The Sherman Road/Fond du lac Drive connection would also be located under this structure. An additional overpass structure would be provided at State Highway 175. (Ex. 1003; Ad. Rec. 00012)

The purpose and need for the project are described in the EA as follows:

The Wisconsin Department has acquired jurisdiction of Lovers Lane Road as part of a larger jurisdictional transfer process involving County Highway J in Washington and Waukesha Counties. The existing facility does not meet standards for a State Trunk Highway including sight distance, pavement and shoulder widths, and clear zone requirements. The pavement structure from STH 175 to STH 60 is inadequate to support truck traffic, thus trucking is restricted from this segment of roadway. The roadway surface north of STH 175 is in good condition due to maintenance resurfacing placed in 1992. However, prior to resurfacing, the existing roadway had experienced severe frost damage and alligator cracking throughout the project length. The roadway was advisory signed as a rough road, and residents and county maintenance officials reported the presence of tree stumps in the roadway fill and subgrade. The existing shoulder width north of STH 175 varies from two (0.6 m) to four feet (1.2 m), which is less than the standard 10-foot (3-meter) minimum for a rural State Trunk Highway. The intersection of Lovers Lane and State Highway 175 is a high accident location with accident rates exceeding the statewide accident rate. In 1998, there were 11 accidents at the intersection of STH 164/STH 175. The 1998 accident rate was over thee times the statewide average for rural State Trunk Highways. Also associated with this intersection is the close proximity of the railroads which may cause traffic to backup to the railroads while waiting to move through the intersection.

In rural areas separation of grade structures (at railroad crossings) should be considered when the highway design speed exceeds 50 mph (80

> km/h) and the exposure factor exceeds 75,000. The exposure factor for this project is 223,500.
>
> The Regional Transportation System Plan for Southeastern Wisconsin: 2020, endorsed by the Southern Regional Planning Commission, recommends Arterial highway capacity improvements and expansion on this highway from Interstate 94 in Waukesha County to State Highway 60 in Washington County. This plan is based upon a year 2020 regional land use plan which contains implications for the preservation and the enhancement of the environment within the region, including the containment of urban sprawl, the preservation of environmental corridors, and the preservation of prime agricultural lands.

(Ex. 1003; R. 00013)

The EA was available for public comment from February 22, 2000, to April 7, 2000. Included is "Basic Sheet A," containing a summary of a March 23, 2000, public hearing conducted in connection with the project. (Ex. 1003; R. 0004) It notes that defendants considered whether a former " . . . Waste Management Landfill site is a significant impact and therefore warrants preparation of an EIS," and contains the following response:

> The [Wisconsin] Department of [Transportation] has determined that potentially hazardous materials associated with an identified landfill site, located 396 m (1300 ft) west of STH 164 on the south side of STH 175, will not affect the Department's proposed project. This determination is based on extensive coordination with the Wisconsin Department of Natural Resources

> (WDNR), documentation review, and field analysis.
>
> There is ground water contamination in the area surrounding the landfill with trichloroethene [sic] (TCE) being one of the contaminants. This site has been under remediation for several years. The closest monitoring well is located approximately 122 m (400 ft) west of STH 164. TCE concentrations in this well have dropped from 3 to 2.2 ug/l, well below the WDNR groundwater enforcement standard of 6 ug/l. Indicated ground water depths of 9m (30 ft) are well below the excavation limits of the roadway or bridge construction.
>
> The Department has determined that the potential for encountering and impacting hazardous materials during construction of this project does not exist. Therefore, there is no purpose or need for preparation of an EIS.

(Ex. 1003; R. 00005)

The EA includes a summary of public meetings regarding the project that took place prior to the March 23, 2000, meeting. (Ex. 1004; R. 00017) The EA, including the section prepared after the EA was released for public comment, includes reviews of alternatives that were considered, including a "no-action alternative," and why those alternatives were not adopted. (Ex. 1003; R. 00006 and 000013) An Accident Analysis Report, relating to the stated primary purpose of the project, was completed for the project also. (Ex. 1004; R. 05409-05415)

On or before February 21, 2000, Jeffrey Gonyo, a member of the plaintiff, raised concerns about the potential impact that the former waste management site and

the project could have on the environment. (Ex. 1005; R. 00143-00144) Plaintiff prepared documents, dated February 21, 2000, entitled, "The Bridge To Nowhere Fact Sheet (Ackerville, WI)." (Ex. 1006; R. 00116-00117)

By one of those documents, plaintiff stated that the southeasterly flowing ground water may be contaminated with toxic, cancer-causing chemicals, and at least two private wells in Ackerville-Highway 164 vicinity have tested positive for dangerous levels of trichloroethylene (TCE), which probably originated from the landfill. According to plaintiff, "[f]urther disturbance of the soil and underground water flows in the Ackerville area will lead to more incidents of cancer and other life-threatening disease. Therefore, allowing the WDOT to build this massive bridge would be like 'throwing gasoline on an already burning fire!' " (Ex. 1006; R. 00117)

Initially defendants responded to those concerns by posing and answering the following question in a document entitled, "**Fact Sheet/Topics of Interest:**"

Environmental Considerations

- The Waste Management Landfill – Hazardous Materials. If there is contamination in the shallow groundwater, couldn't the structure pilings create a "channel" to contaminate to the deep groundwater where our drinking water comes from?:
- *Acknowledge that both WDNR and WDOT are aware of the concerns relating to the Polk Landfill. You can thank Mr. Gonyo for helping to bring the issue to the forefront.*
- *WDOT will be addressing the contamination concerns relating to the STH 164 project as part of*

the Phase 1 hazardous materials assessment. The assessment will evaluate DNR documents about the landfill and assess what impact may be associated with the highway project activities. The WDOT will coordinate with the WDNR as needed. The report will include any recommendation that may be needed to address hazmat concerns.

- *The Phase 1 Assessment Report will become a public document available for review.*
- *Though preliminary assessment of available information has lead both DNR and WDOT to think there are not likely to be significant project hazmat concerns relating to the Polk Landfill it would be premature to make definite statements until the Phase 1 report is completed.*

(Ex. 1007; R. 00143-00145) (bold and italics in original)

A draft version of the above noted **Fact Sheet/Topics of Concern**, included the following information relating to the pilings for the project and the former waste site nearby:

Environmental Considerations

- The Waste Management Landfill – Hazardous Materials. If there is contamination in the shallow groundwater, couldn't the structure pilings create a "channel" to contaminate to the deep groundwater where our drinking water comes from?:
- *This landfill was closed in the 1980's. Since that time, extensive monitoring and remediation has taken place. There has been some concern regarding ground water contamination spreading in the direction of Lovers Lane Road. However, the project*

> *requires limited excavation in this area (footing for substructure units of the bridge) and encounters with ground water* is unlikely.

(Ex. 1008; R. 000146-000147) (bold and italics in original)

By letter dated March 14, 2000, Ken Wade, in his capacity as a Hazardous Materials Engineer for the Environmental Team Transportation District of WDOT, noted that the latest landfill data collected by Waste Management "confirms that the concentration of trichloroethene [sic] (TCE) nearest to the project area" was decreasing or stable. He observed that it was "unlikely that project pilings or water detention/infiltration basis will cause an impact on plume movement or concentrations." (Ex. 1009; R. 00728)

During the March 23, 2000, public hearing regarding the project, a member of the plaintiff challenged the proposition that the project would have no significant environmental impact. He relied on the assertion that the above-noted Polk Landfill was considered a "toxic-waste dump site." The opponent made statements concerning the flow of the contaminant plume and the serious and adverse effects of the contaminants on human health and raised concerns about the pilings for the project. (Ex. 1010, 1011; R. 00189-00195; 00491) In addition, Gonyo testified at the March 23, 2000, public hearing. His testimony, which he supplemented with many exhibits, addressed a contaminant plume from the former waste site and health risks. (Ex. 1012; R. 00197-00254; 00304-00454)

Prior to the March 23, 2000, public hearing officials involved in the project exchanged e-mails regarding their response to the "haz mat" issue. Some suggestions from

Brian Bliesner included: "1) say nothing, (2) final results aren't in, we'll be doing more testing, (3) excavation is only 5 feet deep, we see no problem given the monitoring wells results, (4) all data including DNR's suggestion says there is no problem. But we can't ignore the possibility it might be there. We will monitor during construction and will have a plan to deal with it that includes removal and appropriate disposal if we do encounter haz mat." Kenneth Wade responded, in part, with the following statement:

> Though preliminary assessment of available information has lead both DNR and WDOT to think there are not likely to be significant project hazmat concerns related to the Polk Landfill, it would be premature to make definitive statements until the Phase 1 report is complete.
>
> . . .

(Ex. 1013; R. 0038)

The EMCS Design Group worked with the Wisconsin Department of Natural Resources (DNR) in connection with a review that included consideration of the impact of the former waste site on groundwater. (Ex. 1001 & 1002; R. 02815-02817, 02974) They reviewed a March 30, 1990, report titled "Two-Year Ground Water Monitoring Report Polk Sanitary Landfill Washington County, Wisconsin." (Ex. 1000; R.02774-02814) This report was prepared at the request of the landfill's owner, Waste Management of Wisconsin, Inc., and includes a section entitled "Ground Water Assessment." (Ex. 1000; R.02778, 02780, 02784) The report discusses various aspects of groundwater around the former waste facility, including, the flow of groundwater both vertically and horizontally, the location of monitoring wells, a map of arsenic concentration, and a

conclusion that TCE was not in the landfill. (Ex. 1000; Ad. Rec. 02774, 02778, 02781, 02811) On February 23, 1994, EMCS, issued a "Hazardous Materials Initial Site Review Report" for the project. (Ex. 1014; Ad. Rec. 00873-00908). And, on April 7, 2000, EMCS issued another document entitled, "Hazardous Materials Site Investigation Report Phase I Addendum." (Ex. 1015; Ad. Rec. 00709-00714)

The Phase 1 Addendum was completed "[b]ased on the changes to the scope of the project . . . , as well as the time elapsed since the original reports were created, it was determined that an addendum to the 1994 Phase I investigation is warranted." *Id.* With information relating to the site of the project, the addendum contains the following statement regarding the former waste facility near the project and bridge pilings for the project:

> Site 7 (previous): Town of Polk/Waste Management (WDNR FID #267062400) was identified in the original phase I report as an inactive waste disposal site. There is groundwater contamination in this area with Trichloroethene (TCE) being one of the contaminants. The closest monitoring well is located approximately 400 feet west of STH 164. TCE concentrations in this well have dropped from 3 to 2.2 ug/1, well below the WDNR groundwater enforcement standard of 5 ug/1. This site is 700 feet west of where the proposed Foxboro extension connects to STH 175 and indicated groundwater depths of 30 feet are well below the excavation limits of the roadway. Therefore it is very unlikely that contaminated groundwater will impact this project. It is also unlikely that pilings for the structure supports or retention basins will cause an impact on plume movements or concentrations.

Id.

On April 25, 2000, the last signature was placed on a FONSI issued for the project. (Ex. 1003; Ad. Rec. 000001-0002) The FONSI was premised on the earlier EA for the project. *Id.*

In June of 2000, Gonyo, in his capacity as a member of the Town of Polk Central Committee for Highway J Citizens Group, U.A., 26668 Hwy 164, Slinger, Wisconsin 53086, (which group appears to be a precursor of the plaintiff) made a request to the United States Department of Transportation, FHWA, under the Freedom of Information Act (FOIA), 5 U.S.C. § 552 for information relating to the project. Gonyo was provided with that information under cover of a letter dated July 12, 2000. (Ex. 1016)

Gonyo, again in his capacity as a member of the Town of Polk Central Committee for the Highway J Citizens Group, U.A., requested the Federal Highway Administration to reconsider the FONSI for the project by letter dated July 7, 2000, and recommended an Environmental Impact Statement (EIS) for the project. (Ex. 1017) Gonyo raised various grounds for his requests including an assertion that the pilings for the project should not be inserted into the ground until two landfill sites were "completely cleaned up. . . . " (*Id.*) The FHWA responded to Gonyo on August 24, 2000. (Ex. 1022; R. 06225-06226)

On August 19, 2000, Gonyo, again in his capacity as a member of the "Town of Polk Central Committee for the Highway J Citizens Group, U.A.," advised the FHWA that one of the documents that the agency provided to him pursuant to his request under the FOIA was incomplete. (Ex. 1018) Under cover of a letter dated August 22, 2000, the FHWA provided Gonyo with the documents he requested. (Ex. 1019)

WDNR officials provided WDOT with a memorandum dated August 22, 2000, stating conclusions about why the project, including the portion of the project that called for the insertion of the pilings into the ground to support overpass structures, would have no substantial impact on the existing pattern of groundwater flow, concentration of contaminants, nor cause any increase in health risks due to groundwater contamination in the vicinity. (Ex. 1020; R.12294-12297) That memorandum included the following findings: TCE seems to originate from a point approximately 1500 feet west/northwest of the intersection of Hwy 164 and Sherman Road, the Polk Sanitary Landfill is located approximately 1600 feet northwest of the proposed road construction project, and the groundwater flow has been determined to be southeasterly from the apparent source toward the proposed road project. *Id.*

The memorandum noted that the WDNR disagreed with the allegation that leachate contaminated the underlying groundwater. In that regard, the WDNR found as follows: "WMWI-Polk Landfill is not considered a likely source of the TCE (trichloroethylene) plume because TCE has not been detected in either the landfill leachate or consistently in monitoring wells directly adjacent to the landfill." *Id.* The memorandum further asserted that "[t]he concentration of TCE in area wells has ranged from 17 ug/l (micrograms per liter) in 65-foot deep private wells (1985) to 6 ug/l in a 95-foot deep private well (1987). Monitoring wells screened at depths of 50-60 feet show stabilized concentrations of TCE consistently below 10 ug/l. These concentrations exceed the WI Administrative Code Chapter NR 140 Enforcement Standard of 5 ug/l." *Id.* The memorandum stated that the conclusion was based upon

private drinking water and well sampling, well construction logs, and the DNR's understanding of the project. *Id.*

The WDNR's memorandum set forth specific findings regarding the pilings for the project as follows:

> Driving pilings to depths greater than 30 feet could potentially encounter contaminated groundwater. However, such vertical steel pilings would not, in themselves, contribute any additional contaminants to the groundwater, nor significantly alter flow along any horizontal plane. Theoretically, the flow of groundwater could be altered along vertical lines due to penetration of a piling thru lenses or layers of dense, clay rich soil known as "confining layer" or aquatards. Such layers, if present, normally act to prevent downward or upward movement of groundwater. A piling might compromise a confining layer by creating a narrow (0.5"-3" maximum) concentric space along the outside of a piling or casing.
>
> However, we believe the placement of pilings will not significantly affect groundwater conditions on this project. As documented by well logs and soil bearings, there is no effective, continuous confining layer in the project area. Without any effective separation of the shallow sand and the gravel aquifer from the deeper dolomite aquifer, groundwater already moves freely along vertical planes. In fact, several well nests near the proposed project record consistent upward gradients, an indication that deeper aquifer water is discharging into the shallower system. The relatively small increase in vertical groundwater movement which might be expected along open spaces surrounding even several dozen pilings is

> insignificant compared to the quantity of natural vertical movement.

Id.

The identities and qualifications of the WDNR employees who wrote the memorandum are cited at pages 20 to 22 of the "Defendants' Answers to the Court's Questions." Those individuals are Philip N. Fauble, a Senior Hydrogeologist, Southeast Region Waste Management Program, and Charles A. Czarkowski, Southeast Region Drinking Water & Groundwater Program Expert. (Ex 1021, pp. 2021) Fauble has worked with the WDNR for 12 years, and his duties include inspections of existing and closed landfills for compliance with state groundwater standards, and evaluating responses to groundwater contamination from landfill releases. He holds a Bachelor's degree in Geologic Science, and is a Wisconsin Registered Professional geologist. Czarkowski has worked with the WDNR for 23 years, and is a Wisconsin Certified Soil Tester and Morphological Evaluator. He has participated in original and subsequent WDNR investigations of drinking water problems in Ackerville since 1984.

At plaintiff's request, the United States Environmental Protection Agency (EPA) made inquiries about the project. In a letter dated August 28, 2000, the WDNR responded to an EPA inquiry by advising that TCE was not coming from the former waste facility near the project. The letter noted the "WDNR has also determined that the proposed WDOT road expansion and bridge project on STH 164 will not have an adverse impact on groundwater in the Ackerville area." (Ex. 1023, 1024; R.10166-10171, 10164, 10165) The EPA responded to plaintiff's concerns in

a letter dated January 12, 2001 (Ex. 1024; R. 10164-10165)

On January 22, 2001, John E. Thresher, Jr., apparently acting on behalf of the plaintiff's former attorney, provided Fauble with criticisms of the DNR's groundwater analysis at the former waste site near the project. (Ex. 1025, R. 12298-12317)

On February 26, 2001, EMCS issued a report entitled, "Subsurface Exploration and Geotechnical Engineering Analysis," acknowledging that the pilings for the project would extend below the groundwater level. (Ex. 1026, pp. 8-9; R. 03219-03235) The WDOT petitioned the Wisconsin Commissioner of Railroads (OCR) on May 16, 2001, for alteration and closure of railroad tracks at the public crossing in the immediate vicinity of the project. (Ex. 1027; R. 14100) On July 10 and 11, 2001, a public hearing took place in connection with that petition. Plaintiff, acting under the name "Stop Unnecessary Road Expansion (SURE)," presented testimony and a report from Thresher. (Ex. 1027 p.11; R. 14110). Its evidence included a letter dated, July 11, 2001. (Ex. 1028; Ad. Rec. 14559-14563)

By e-mail message dated July 26, 2001, Art Bauman, of WDOT, referenced a June 2001 publication of a study about the environmental impact of pilings placed into contaminated soil:

> Attached is a copy of the study that was referenced in the June issue of Civil Engineering that discussed the impact piling driven into contaminated soil would have on the local groundwater. We are using Cast-in-place concrete piling which the study concludes would not cause the transport

> of contaminated materials between aquifers as contended by SURE's expert John Thresher.
>
> A reminder that the DNR has indicated that the area is one distinct aquifer and not several separated aquifer's as Mr. Thresher has testified. Also, the DNR indicates that the presence of an upgrade flow of groundwater meaning it flows from deep to shallow which would prevent the contamination from flowing down to the wells.

(Ex. 1029; R. 13828)

The study to which Bauman referred was entitled, "Deep Foundations on Brownfield Sites." (Ex. 1030; R. 13829-13834) The study states, in part:

> Abstract
>
> Most older industrial areas exhibit some soil and/or groundwater contamination, ranging from minimal to DNAPL'S. Redevelopment of such "brownfields" areas often involves deep foundations such as piling. Regulators fear that deep foundations might transmit contaminants from polluted upper layers to clean lower aquifers. This potential problem has three parts: direct transfer of contaminated soil by the tips, formation of preferential pathway by the pile, and flow through the pile material. The direct transfer part is shown to be minimal, especially with pointed pile tips. The pathway part was investigated using model studies, in which flow was induced through clay soil columns with segmented bases to separate central and perimeter flow. Models with and without various types of model piles fully penetrating the clay were permeated with water and brine. Both flow and contaminant measurements indicated no increase in

transmission rates for displacement-type piles of low-permeability materials, i.e., treated wood and steel pipe. Two piles induced higher transmission: untreated wood by internal flow and steel 'H' piles by pathway formation (due to low lateral pressures). It was concluded that piles of the proper types driven through a contaminated zone did not create a significant pollution potential.

Introduction

Brownfields are often desirable building sites because of their location within or close proximity to urban areas. Construction at these sites often raises questions regarding environmental and health issues. One such question is the potential for contaminating deeper aquifers via the pile foundations often required for industrial or multi-story structures. Piles penetrating contaminated soils and driven through an aquifer to achieve end-bearing in a deeper sand aquifer may transfer or provide a migration pathway for contaminants. The current knowledge of pile/soil behavior in a contaminated soil environment is very limited. Consequently, regulatory authorities often require extensive and expensive protection measures (such as grouted casing) for piles in this situation. Thus, there is a real worlds need to address this topic to serve as a guide in the design of pile foundations in a brownfield environment.

Problem Statement and Objectives

The main concern is that the penetration of the contaminated zone and the aquitard by the pile will transfer and/or allow the migration of contaminants vertically. While there would be slow movement through the clay aquitard, the mecha-

nisms created by the pile are (1) direct transfer of soils at the pile tip, which is a one-time event, (2) flow in the zone disturbed by pile-driving, including the pile/soil interface, and (3) flow through the pile materials itself. The flow mechanisms are long-term phenomena. The objective of this study was to evaluate the cited mechanisms to determine if pile foundations can be used in an environmentally safe manner for a brownfield situation without special protective measures. Direct transfer was evaluated through geohydrologic calculations. The vertical transfer of flow along the pile/soil interface and the influence of the pile type was investigated through laboratory modeling. The long-term flow is the most serious potential problem. The model tests investigated the effects of pile type on flow and contaminated migration.

. . .

Conclusions

The results of this study confirmed the findings of the earlier work by Hayman et al (1) but expanded them. Driven piles can be used on even "brownfields" sites without causing adverse environmental effects. However, the proper type(s) of piles must be selected to avoid such effects. The piles should be of low-permeability materials such as steel and possibly concrete to avoid internal flow. A displacement-type pile such as wood, pipe, or "square" piles should be used to develop the lateral pressure needed to seal any annular space. Use of a pointed pile tip reduces direct transfer of contaminants to a negligible level.

Id.

By e-mail dated August 24, 2001, Czarkowski of the WDNR, who was one of the authors of the above-noted August 22, 2000, memorandum, (¶¶ 34-41) made the following inquiry to Art Bauman, of WDOT:

> I am the Drinking Water/Groundwater program coordinator here in the southeast region. I and others in our department have appeared at various public meetings to address concerns of opponents of the Ackerville Bridge project. This group and their attorneys/consultant claim there are environmental hazards related to contaminated groundwater which the bridge will make worse. Most recently, their consultant specifically stated that the driving of pilings would provide a path for the groundwater to migrate.
>
> When I first reviewed the environmental concerns regarding this project as part of the team here at DNR, I was aware that pilings would be driven below depths of 30 feet, which is where the groundwater occurs. We do not dispute that a very low level of trichlorethylene may exist in this groundwater. I offered an opinion that these pilings would not in any way affect groundwater flow, assuming they would be filled with solid material.
>
> **The reason I am writing now is to confirm that such pilings will indeed be filled with some impermeable material such as concrete or bentonite clay, and not merely be hollow casing.** I have reviewed the plan sheets and see that the specification reads "*support pier on 10 3/4" dia. cast-in-place concrete piling (min T + 1/4")* estimated 50 f. long and driven to a minimum brg. value of 45 tons per pile."

> Does this mean the pilings will be filled with concrete?
>
> If yes, then I can maintain my opinion that these should not provide a significant pathway for migration of groundwater. I[f] not, then I would like to discuss the possibility of a design change that would fill these pilings with bentonite or cement.

(Ex. 1031; R. 13827) (bold in original).

Bauman responded to Czarkowski by e-mail dated August 27, 2001, stating:

> I have confirmed your question with Keith Nelson, the structural engineer for these bridges. All pilings driven for the bridges over the railroad tracks and STH 175 **will be filled with concrete**. The MSE Wall between these structures will not have any piling driven for it.
>
> We are using H-piling for a retaining wall that is to be located on the east side of Lovers Lane starting approximately 600 feet north of the north end of the structure over STH 175 (at the top of the hill). The bottom elevation of the retaining wall (elevation at the final ground surface) is approximately forty feet higher than the elevation of STH 175 at the STH 164 overpass structure. The piling will be driven to a depth of no more than 16 feet. If this is a concern please let me know ASAP.

(*Id.*) (bold in original)

Meanwhile, the OCR issued its Final Decision on October 19, 2001, granting the petition of WDOT to alter and close the railroad tracks in the vicinity of the project. (Ex. 1027; R. 14099, 14100) The Final Decision includes a

summary of environmental issues that were raised in connection with the petition, including the allegations that the plaintiff makes regarding the pilings for the overpass structures for the project. That portion of the order contains the following comments regarding the pilings and the WDNR's review:

> At the hearing, the DOT submitted a "Finding of No Significant Impact" (FONSI issued by the Federal Highway Administration. [footnote excluded] the FONSI was prepared for the STH 164 project, including the highway bridge over the railroad tracks. The FONSI states:
>
> > This finding of no significant impact is based on the attached environmental document which has been independently evaluated and determined to adequately and accurately discuss the environmental issues and impacts of the proposed project. It provides sufficient evidence and analysis for determining that an environmental impact statement is not required. This project will not have any significant impact on the human environment.
>
> This finding was based on an environmental assessment (EA) prepared by the DOT in accordance with its own administrative rules and with federal law. DOT performed an initial assessment in 1999 that indicated no significant impacts from the STH 164 project. [footnote omitted] The DOT then took public comments on the EA, including a public hearing, and reviewed the EA in coordination with other agencies [including, FHWA, Wisconsin Department of Natural Resources (DNR), US Fish and Wildlife Service, State Historical Society, Department of Agriculture, Trade and Consumer Protection,

Natural Resources Conservation Service and several Indian tribes]. The FONSI document was approved by FHWA on April 25, 2000.

A citizen group opposing the bridge project, Stop Unnecessary Road Expansion (SURE), presented testimony at the hearing disputing this finding. SURE retained an expert witness, John Thresher, who testified at the hearing and submitted his own written analysis. It is undisputed that portions of groundwater west of the project area are contaminated with arsenic and trichloroethylene (TCE). The question is whether the bridge project will worsen or affect this contamination. Although SURE raised other environmental concerns. the primary concern expressed by SURE relates to the potential spread of contaminated water in the project area. More specifically, SURE contends that the pilings needed for the bridge will penetrate the water table and potentially allow the migration of contaminated water toward private wells in the Ackerville area.

In essence, SURE argues that the environmental assessment prepared by the DOT and approved by the FWHA is inadequate and asks that the OCR order a full environmental impact statement (EIS or, alternatively, to deny approval of the bridge construction until DOT prepares a full EIS, [footnote omitted]

. . .

A review of the evidence submitted at the hearing supports the reasonableness of adopting the DOTs environmental assessment. The primary concern is that driving the bridge pilings may create a way for contaminated groundwater to

spread further. The water table is 30' below the surface. The pilings will extend 50' to 73' below the surface. SURE's expert states: "driving pilings through such sediments may disrupt the contaminant distribution thereby potentially contaminating additional private wells well within Ackerville." (Exhibit 33)

The DNR advised DOT regarding potential adverse effects on contaminated groundwater. The DNR stated: 'our conclusion is that the road project will not have any substantial affect on the existing pattern of groundwater flow, concentration of contaminants, nor cause any increase in health risks due to groundwater contamination in the vicinity.' (Exhibit 30-DNR memorandum to DOT dated August 22, 2000) The DNR specifically considered the effect of the pilings and determined that driving would not "significantly affect groundwater conditions on this project." DNR further stated that driving pilings through "layers of dense clay-rich soil known as 'confining layers' or aquatards could theoretically alter the flow of groundwater "along vertical lines." However, DNR concluded that there is no confining layer at the bridge site and therefore "groundwater already moves freely along vertical planes." Consequently, driving pilings will not significantly affect the movement of groundwater.

The environmental issues raised by the opponents have already been adequately addressed by the environmental assessment done by DOT. Requiring another EA or a full EIS would only serve to delay an important safety project without any likely environmental benefit.

(Ex. 1027, pp. 11-13; R. 14110-14112) On November 29, 2001, OCR denied petitions for a rehearing. (Ex. 1032; R. 14079)

In a letter dated December 12, 2001, Gonyo, in his capacity as a member of the "Town of Polk Central Committee for the Highway J Citizens Group, U.A.," made another FOIA request to the FHWA for all documents that came into the agency's possession following the June 19, 2001, FOIA request. Gonyo received a response, dated December 18, 2001. (Ex. 1033) Thresher, discussed the pilings in a February 2, 2002, document entitled, "Summary of the Groundwater Contamination in the Ackerville Area Washigton [sic] County, Wisconsin." (ex. 1034; R.10128)

The Wisconsin Department of Health and Family Services, Division of Public Health, issued a February 26, 2002, document entitled, "Public Health Assessment for Ackerville Area Groundwater" for the WDNR, the Washington County Health Department, and the Agency for Toxic Substances and Disease Registry. (Ex. 1035; R. 10142-10157) The assessment concludes:

> There is limited groundwater contamination in the Ackerville area west of the intersection of Highways 164 and 175.
>
> Although one private well has tested positive for a trace level of TCE, none of the private wells in this area contain contamination at levels of health concern.
>
> Concerns about taste and odors in private well water are the result of aesthetic problems from naturally occurring iron levels, as well as the presence of nuisance bacteria.

> Cancer rates for the Ackerville Zip Code are not elevated when compared to statewide rates or the neighboring Richfield Zip Code.
>
> Because there was [sic] has been very little human exposure to contaminants of concern at this site a more thorough evaluation of health outcome data is not warranted.

(Ex. 1035, p. 8; R. 10151) The assessment also includes the following inquiry and response;

> Is it true that the bridge construction project will make groundwater contamination worse in our area? No. There is no relationship between the proposed bridge construction project and area groundwater quality. The groundwater is 30 feet below the ground surface and will not be affected by the bridge or road construction.

(Ex. 1035, p. 11; R. 10154)

By a letter dated February 27, 2002, WDOT Secretary Gene E. Kussart, responded to a January 2002 request by Wisconsin State Representative Suzanne Jeskewitz. Kussart advised that the WDOT would accommodate her request to install additional monitoring wells in the immediate vicinity of the project. (Ex. 1036) Kussart's letter noted that data from the new monitoring wells would be provided to the WDNR. However, he also stated that "[b]ased on the judgments of our experts and those within the DNR, we continue to believe the presence of groundwater contaminants, if detected, should have no impact on project activities." (*Id.*)

STS Consultants Ltd., 11425 West Lake Park Drive, Milwaukee, Wisconsin 52224, was contracted to complete the new well installation and monitoring discussed in

Kussart's above-noted letter of February 27, 2002 (Ex. 1037; R. 10081-10085) The purpose of the work they were engaged to complete was as follows:

> The purpose of the well installations and groundwater monitoring is to determine potential impacts of upgradient groundwater contaminant sources on areas of bridge pile support installation.

(Ex. 1038; R. 10086-10087) More specifically:

> Our proposal to install monitoring wells in Ackerville will cost $32,000. The following paragraphs detail the proposal. We are in the process of drafting the reply letter to the legislators and will have it to you by the middle of next week.
>
> We are proposing to install and monitor three nests of wells approximately 350 to 500 feet apart along the west right-of-way of STH 164 (Lovers Lane Rd) in Ackerville. The wells would be located on the north and south sides of the railroad corridor and just south of STH 175 (the contamination is located between the railroads and STH 175 and would be expected to move southeasterly towards the railroads). The wells would be tested at installation and quarterly for a two-year period after the piling is driven. The samples would be tested for water level, conductivity, temperature, VOCs (with TCE the target analyte), and dissolved arsenic. Installation of wells on the east side of STH 164 is expected to double the price above. It would cost $1,500 to abandon the three nests of wells. The cost for abandonment is not included in the $32,000 figure. We are recommending that the wells be left in place and not be abandoned after the two years are up.

All results will be turned over to the DNR.

* Each nest would consist of two wells, one being a water table well (10 feet into the water table) and the other a piezometer well (35 feet into the water table). The upper water table limits are about 30 feet below ground. The piling is expected to be driven no more than 45 feet into the water table. All wells would have locking protective caps.

(Ex. 1039; R. 10120; Ex 1039A; R. 10119)

By e-mail dated April 24, 2002, Wade of WDOT reached various conclusions from the initial sampling results that STS Consultants obtained from the new monitoring wells. That e-mail included the following statements:

> The WDOT contractor, STS Consultants, has completed installation and the first round of sampling of three pairs of groundwater monitoring wells installed in the Ackerville area of the STH 164 highway project. The wells were installed along the west side of the right of way adjacent to areas planned for bridge pile installation.
>
> . . .
>
> Conclusion
>
> The confirmation of permeable aquifer materials, upward hydraulic gradients, low contaminant concentrations, and lack of any apparent contaminant source in the immediate project area all reinforce our earlier conclusion that project construction activities, including the driving of piles, will have no significant impact on the continuing migration of the contaminants in the project area. No modification of highway project should be required.

Further Course of Action:

1. Provide draft of monitoring report to Jim Delwiche, Chad Czarkowski, and Phil Fauble of WDNR for their review and comment. We will advise them of the current project construction schedule that includes a May 6th start date and request a response by Friday May 3rd. A draft report will also be provided Charles Warzecha, Wis. Health and Family Services.

2. After receipt of the DNR comments the report will be finalized and provided to the state personnel above, affected state legislators, project manager, and John Thresher (SURE hydrogeologist).

WDOT will continue groundwater monitoring for another 8 quarters (two years) and report the results quarterly to the WDNR.

(Ex. 1040; R. 10093)

In a May 2, 2002, memorandum, Fauble of the WDNR, stated that he reviewed STS Consultant's data regarding the new monitoring wells. He noted that "[n]one of the data presented in this draft report in any way contradicts the WDNR's findings in the memo to the WDOT dated August 23, 2000 [the actual date of the memo is August 22, 2000], which states, "Our conclusion is that the road project will not have any substantial effect on the existing pattern of groundwater flow, concentration of contaminants, nor cause any increase in health risks due to groundwater contamination in the vicinity." (Ex. 1041; R. 10091-10092).

Given his review of the results of STS Consultants' work, Fauble concluded as follows:

> In summary, the data presented in the draft report shows that there are very low levels of VOC contamination present in the shallow groundwater beneath the site. However, there were no detects of arsenic in any well. The TCE levels are well below the State's enforcement standards and are consistent with very low level TCE source originating northwest of the site, near the railroad yard. The trichloromethanes are likely the result of chlorinated municipal water that was introduced by the well construction. The very low-level gasoline-range VOC detects are likely the result of small roadside spills or [sic] introduced during sampling.

(*Id.*)

STS Consultants, Ltd., in a letter dated August 1, 2002, provided documentation of groundwater sampling activities completed at the new monitoring wells as of July 2002. (Ex. 1042; R. 14863-14871) It does not appear that any of the results exceeded the NR 140 Enforcement Standard. (Ex. 1042; R. 14863-14871) Results of STS Consultants' monitoring of the new wells in October 2002 are set forth in a document dated November 14, 2002. (Ex. 1046)

By a memorandum dated November 21, 2002, Art Bauman of WDOT noted: "Attached for your review is a copy of the monitoring well results for the samples taken in October 2002. The results show that the TCE levels are all well below detectable limits. Arsenic values have increased in two wells, but all are below the DNR Prevention Action Limit. We continue to believe that the Lovers Lane Project will not have any impact on the groundwater in the Ackerville area." (*Id.*)

The construction of the project, including the insertion of the pilings into the ground, began in May of 2002. (Defendants' Surreply to the Plaintiff's Reply, p. 3; (Ex. 1043, entry 18)) The project called for a total of 177 pilings to be inserted into the ground. (*Id.* at p. 1) When plaintiff filed this lawsuit on July 3, 2002, 150 of the 177 pilings, or 84% of pilings for the project, had been inserted into the ground. (Defendants' Surreply to Plaintiff's Reply, p. 1; (Ex. 1043, entry 18))

Plaintiff submitted four (4) explanations for its failure to commence this action before or soon after construction began, and before 84% of the pilings had already been inserted into the ground. (Plaintiff's Reply, pp. 15 & 16; (Ex. 1043, entry 14)) Those explanations are:

> 1. Administrative efforts that they made prior to filing suit in connection with having further review of the pilings conducted;
>
> 2. Some review of testing was set forth in a report that was not issued until May 2, 2002;
>
> 3. The plaintiff's [sic] "had to hire replacement counsel and did so during the second week of June 2002."; and
>
> 4. In mid-June of this year, plaintiff's current counsel advised counsel for one of the defendants that the plaintiff would be seeking a temporary restraining order.

(*Id.*)

B. WDOT Project 2748-01-01

The second project is identified as Project I.D. 2748-01-01. On April 9, 2001, a final Environmental Impact

Statement (EIS) for this project was approved by the Federal Highway Administration for distribution to agencies and the public. (Ex. 1045, p. III) On March 6, 2002, the FHWA adopted the selected alternative that was set forth in the EIS for "WisDOT Project I.D. 2748-01-01." (*Id.* at 12) The EIS includes the following information about that project:

> **Location**
>
> The 18-mile (29-km) County J/WIS 164 study corridor extends from Rockwood Drive north of I-94 in Waukesha County to a point north of County E in Washington County. At its northern terminus, the County J/WIS 164 project abuts the Lovers Lane Road project, previously approved by the Federal Highway Administration (FHWA). See location map inside front cover, and discussion on project termini in Section 1, "Purpose of and Need for Proposed Action.["]
>
> **Proposed Action**
>
> The Wisconsin Department of Transportation (WisDOT), in consultation with the Federal Highway Administration (FHWA), is studying alternatives for providing additional highway capacity in the County J/Wis 164 corridor in accordance with recommendations in regional and county transportation system plans. County J/Wis 164 is a principal arterial highway serving adjacent development and local traffic in the City of Pewaukee, Villages of Pewaukee and Sussex, and Towns of Lisbon, Richfield, and Polk, as well as providing a regional transportation connection between I-94 and US 41 (via WIS 60). The *2020 Regional Transportation System Plan* and *Jurisdictional Highway System Plans* for Waukesha and Washington counties document the need for

additional capacity on County J/WIS 164 to address existing and future traffic demand along a corridor that is transitioning from rural to urban/ suburban development.

Key objectives for proposed improvements to County J/WIS 164 include the following:

- Address present and emergency safety concerns including congestion, traffic conflicts and numerous access point, and geometric deficiencies such as poor sight distance at several hills
- Provide a recommendation plan to guide future land use and development decisions and to preserve land needed for potential future highway improvements
- Improve local and through traffic access to adjacent development as well as to destinations outside the corridor
- Serve traffic demand generated by existing and planned development along the highway as well as in the surrounding region

The need for improvements is demonstrated through a combination of the factors described below.

Traffic Demand

Traffic on County J/WIS 164 is expected to increase by 60 percent or more within the project's planning period (design year = 2025). Wis DOT uses 13,000 Average Daily Traffic (ADT) as the threshold volume that can be safely handled at an acceptable level of service on a 2-lane suburban highway. In Waukesha County, traffic currently exceeds this threshold in the I-94 to

Capitol Drive and County VV to Plainview Road segments. Based on projected development and traffic trends, the threshold is expected to be reached on all Waukesha County segments by 2025. All Washington County segments are below the threshold and are expected to remain so through 2025 unless development exceeds the intermediate level envisioned in the regional and county transportation system plans.

Today's average daily truck volumes range from 250 (lowest volume segment) to 715 (highest volume segment). In 2025, truck traffic is expected to reach 415 to 1,150 per day. The Waukesha County portion of the study area operates at maximum capacity during morning and evening peaks. Under forecast traffic for 2025, the entire highway will be at maximum capacity during peak hour traffic conditions.

Existing Deficiencies

At numerous locations, the vertical profile does not meet stopping sight distance for posted speed limits, and there are over 300 access points that contribute to traffic operation and safety concerns. Cross traffic and turning traffic combined with speed changes and lack of auxiliary lanes, reduces operational efficiency, capacity, travel speed, and safety. The at-grade railroad crossing just north of County VV warrants a grade separation based on an exposure factor that exceeds national criteria.

Safety

During the period 1996 through 1999, 269 crashes occurred on County J/WIS 164. Highway mainline crash rates in the Rockwood Drive to County M segment exceeded statewide average

rates for similar roadways for all sections of the corridor and not the Rockwood to CTH "M" section in 1999; the County M to Lisbon Road segment exceeded statewide rates in 1996 through 1999; the County Q to WIS 167 segment exceeded statewide rates in 1998. There were two fatal crashes in 1999; one at the Hubertus Road intersection, and one south of the Monches Road intersection. The County M intersection had a crash rate above the national intersection crash rate in 1999, the Capitol Drive intersection was above the rate in 1997 and 1998, the County VV intersection was above the rate in 1999, and the County E intersection was above the rate in 1996.

Corridor Preservation

Corridor preservation will be an important tool for protecting land needed for future highway improvements on portions of County J/WIS 164 where the 13,000 ADT threshold for capacity expansion is not expected to be reached by 2025. The County J/WIS 164 study will provide functional highway plans that can be used by local governments as a blueprint for making land use and development decisions that preclude or minimize disruption to established and planned community facilities.

(*Id.* at ¶ IV-VI) Plaintiff opposed "Project I.D.2748-01-01" as a "second part" of the above-noted Project I.D. 2748-01-00. (*See* Plaintiff's Brief on the Merits, p. 5; Complaint ¶ 9)

CONCLUSIONS OF LAW

A. Standing

To bring suit in federal court, a plaintiff must have standing to raise its claim. *Tobin for Governor v. Ill. State Bd. of Elections*, 268 F.3d 517, 527 (7th Cir. 2001). Defendants did not challenge standing, but the court must address the issue regardless of whether the parties have, *see Rhoades v. Johnson*, 153 F.3d 785, 787 (7th Cir. 1998). Establishment of standing requires a plaintiff to show (1) that it has suffered an injury in fact, (2) caused by the defendant, (3) that a favorable decision will likely redress. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992); *Tobin for Governor*, 268 F.3d at 527. When the plaintiff is an association, the standing test is modified somewhat. The plaintiff must demonstrate (1) at least one member would have standing on his or her own, (2) the interests that the association seeks to protect are germane to its purpose, and (3) "'neither the claim asserted nor the relief requested requires the participation of individual members.'" *Retired Chi. Police Ass'n v. City of Chi.*, 7 F.3d 584, 600 (7th Cir. 1993) (quoting *Hunt v. Wash. Apple Adver. Comm'n.* 432 U.S. 333, 343 (1977)). Plaintiff bears the burden of proof and must support each element "in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stages of the litigation." *Allian Energy Corp. v. Bie*, 277 F.3d 916, 919 (7th Cir. 2002). Thus, at the preliminary injunctions stage, plaintiff must show that it has a reasonable likelihood of demonstrating each element of standing.

Here, plaintiff is an unincorporated association of Waukesha and Washington Counties residents "who are concerned about the potential destruction of the region."

Members are "committed to preserving the beauty, tranquility and environment of the area" and include persons "whose water supply is threatened with contamination from arsenic and TCE as a result of the proposed Ackerville bridge project." Contamination of members' water supplies is an injury in fact which will, if plaintiff's theory holds, be caused by the defendants. This harm will be redressed, at least partially, if plaintiff receives the relief it seeks because removing and/or grouting the pilings will stop further contamination. Thus, at least some of plaintiff's members have a reasonable likelihood of showing standing to sue as individuals. As for the association, stopping the bridge construction is germane to its purpose. Indeed, the organization was created to oppose the greater highway construction project of which the bridge is a component. Finally, the claim asserted and the equitable relief sought do not require the participation of individual members. Thus, plaintiff association has a reasonable likelihood of demonstrating that it has standing.

B. Plaintiff's Delay in Seeking Relief

First, defendants argue that the doctrine of laches bars plaintiff's claims, and/or that the case is moot. Laches applies when a "plaintiff has waited for an unreasonable length of time to assert his claim and the defendant has been prejudiced by the delay." *Horbach v. Kaczmarek*, 288 F.3d 969, 973 (7th Cir. 2002). Along the same lines, NEPA claims have been rejected based upon substantial completion of projects. *See Environmental Rights Coalition, Inc. v. Austin*, 780 F. Supp. 584, 587 (S.D. Ind. 1991), citing *South East Lake View Neighbors v. Department of Housing and Urban Development*, 685 F.2d 1027, 1039 (7th Cir. 1982) (denying relief under NEPA

where "building [was] in the final stages of construction"); *Richland Park Homeowners Ass'n, Inc. v. Pierce*, 671 F.2d 935, 941 (5th Cir. 1982) ("the basic thrust of the NEPA legislation is . . . not to serve a basis for after-the-fact critical evaluation subsequent to substantial completion of the construction"); *Friends of the Earth, Inc. v. Bergland*, 576 F.2d 1377, 1379 (9th Cir. 1978) (denying post-completion relief on mootness grounds because the court did not have authority to "undo what has already been done"); *Ogunquit Village Corp. v. Davis*, 553 F.2d 243, 246 (1st Cir. 1977) (denying "post-completion relief.")

Plaintiff has battled this project for years. Gonyo, a representative of the plaintiff, prepared "The Bridge To Nowhere Fact Sheet" in February of 2000, and made repeated FOIA requests as early as June of 2000. Bridge pilings were inserted into the ground starting in May 2002. Yet, plaintiff did not file a complaint until July 3, 2002, when a total of approximately 150 pilings (or 83%) had been inserted. Defendants argue that if plaintiff believed that grouting around the piles could avert or lessen environmental harm, it should have sought relief long before the vast majority of the pilings were inserted. At the hearing before this court on the merits of plaintiff's claims, defendants represented that the Ackerville Bridge/Lovers Lane Reconstruction project is "substantially complete" and will open in mid-June.

Regardless, under the circumstances of this case, the court declines to hold that the plaintiff is barred by any delay in filing this suit or that the case is moot because one of the two projects at issue is substantially complete. First, NEPA ensures compliance with a process, and alternative remedies remain available to the plaintiff. This court could order the defendants to prepare an EIS or

Supplemental EIS for all of the County J/Highway 164 project to further assess the environmental impact, and/or order the defendants to grout the length of the pilings. To hold otherwise would suggest to agencies that they could rust to construction and thereby avoid compliance with NEPA requirements. Second, plaintiff seeks an injunction preventing defendants from widening County J/Highway 164 from I-94 in Waukesha County to STH 60 in Washington County from two lanes to four lanes, and that project could still be enjoined.

Finally, plaintiff has documented its administrative efforts to have the contamination issues considered before filing suit. As recently as February 2002, plaintiff was successful in getting a commitment from the WDOT for further testing. Testing was conducted in early April 2002 with a report issued May 2, 2002. The driving of the pilings began in May. At or about that time, defendants were notified that plaintiff intended to file suit and plaintiff hired replacement counsel. Also, at the July 19, 2002, status conference, Attorney Remington and AUSA Guadagnino represented to the court that defendants planned to continue with the construction of the project pending the court's ruling and would assume the risk of having to remove portions of the constructed project to conduct grouting, if ordered. Defendants made a calculated decision to assume the risk of going forward, and any prejudice to the defendants is not the result of plaintiff's inaction. Consequently, the court turns to the merits of plaintiff's claims.

C. Project I.D. 2748-01-00

Plaintiff is required to show that defendants acted arbitrarily and capriciously in finding that the Ackerville Bridge/Lovers Lane Reconstruction Project would have no significant impact and, thus, declined to issue an EIS. In challenging an agency's action under NEPA, the plaintiff bears the burden. *Sierra Club v. Marita*, 46 F.3d 606, 619 (7th Cir. 1995). The court's review is limited to the administrative record.

Plaintiff argues that the defendants failed to consider adequately the effect of the bridge pilings on TCE in the groundwater and soil and on arsenic contamination. The EA shows that the agency considered the TCE and concluded that the project will not effect [sic] groundwater adversely because (1) the TCE level in the closest monitoring well was below the WDNR standard and dropping and (2) construction would not reach the groundwater, which is at a depth of thirty feet. However, the EA, FONSI and supporting documents contain no mention of the pilings; and it is undisputed that the pilings reach a maximum of eighty feet, well below the water table. Thus, the EA and FONSI do not indicate whether the defendants considered what effect driving pilings eighty feet into the ground would have on the TCE present in the soil and groundwater.

There are few mentions of pilings in contemporaneous documents. The Phase 1 Addendum states that it is "unlikely that pilings for the structure supports . . . will cause an impact on plume movement or concentrations." (R. 1015, 00714) Defendants represent that the Phase I Addendum is one of the reports that EMCs, Inc., used to conclude that there would be no hazardous materials

impacts occurring as part of the proposed project. In addition, the March 14, 2000, letter to EMCS from the WDOT District 2 Hazardous Materials Engineer states that it "is also unlikely that project pilings or water detention/infiltration basins will cause an impact on plume movement or concentrations." (R. 1009, 00728)

However, the evidence cited in the Phase 1 Addendum addresses the dropping concentration of TCE in the closest monitoring well. Because defendants admit that the actual depth of the pilings was not known until June of 2001 (after the EA and FONSI issued), EMCS did not know the depth of the pilings when it prepared the addendum. Thus, its conclusion that no harm would result is suspect. In addition, the addendum was prepared at the direction of WDOT after the agencies had given preliminarily [sic] approval to the EA and FONSI.

On the other hand, plaintiff didn't raise its concerns about the pilings until the EA issued and was released for public comments. Even after the EA and FONSI issued, the FHWA continued to solicit comments and gather information in response to agency and public concern.

It appears that the parties are in agreement that the reviews conducted after the FONSI was issued but before the construction began should be viewed as supplements to the administrative record of the project. *See Lakes Region Legal Defense Fund, Inc. v. Slater*, 986 F. Supp. 1169, 1196 (N.D. Iowa 1997) ("A formal 'supplemental EA' has not been prepared for the case. However, the administrative record indicates that the defendants have continued to review the impacts associated with changed conditions in the Highway 71 project . . . [t]he defendants

have fulfilled their obligation under NEPA by continuing to review potential impacts resulting from the Highway 71 project.").

WDOT inquired into the effect of the pilings on the TCE plume by soliciting information from WDNR. The August 22, 2000, WDNR memorandum ("the WDNR memorandum") is a two and one-third page, single-spaced document concluding that driving pilings below thirty feet will neither significantly alter the flow of groundwater, which already moves vertically and horizontally, nor introduce additional contaminants. With specific reference to driving pilings deeper than thirty feet, the authors state:

> Driving pilings to depths greater than 30 feet could potentially encounter contaminated groundwater. However, such vertical steel pilings would not, in themselves, contribute any additional contaminants to the groundwater, nor significantly alter flow along any horizontal plane. Theoretically, the flow of groundwater could be altered along vertical lines due to the penetration of a piling thru lenses or layers of dense, clayrich soil known as "confining layers" or aquatards. Such layers, if present, normally act to prevent downward or upward movement of groundwater. A piling might compromise a confining layer by creating a narrow (0.5"-3" maximum) concentric space along the outside shaft of a piling or casing.
>
> However, we believe the placement of pilings will not significantly affect groundwater conditions on this project. As documented by well logs and soil borings, there is no effective, continuous layer in the project area. Without any effective

> separation of the shallow sand and gravel aquifer from the deeper dolomite aquifer, groundwater already moves freely along vertical planes. In fact, several well nests near the proposed project record consistent upward gradients, an indication that deeper aquifer water is discharging into the shallower system. The relatively small increase in vertical groundwater movement which might be expected along open spaces surrounding even several dozen pilings is insignificant compared to the quantity of natural vertical movement.

To reach this conclusion, the authors state that they looked to evidence from private drinking water and groundwater sampling, well construction log data and soil borings, recounting this data in some detail. E-mail messages filed by defendants and attached to the WDNR memorandum indicate that WDOT and FWHA relied on the WDNR memorandum to find that the pilings would have no significant impact on the environment and, thus, determined that the FONSI remained valid and no further inquiry was needed.

In addition, both the WDOT and WDNR reviewed STS Consultant's initial sampling results obtained from the monitoring wells. The Hazardous Materials Engineer for the Environmental Team Transportation District of WDO concluded:

> The confirmation of permeable aquifer materials, upward hydraulic gradients, low contaminant concentrations, and lack of any apparent contaminant source in the immediate project all reinforce our earlier conclusion that project construction activities, including the driving of piles, will have no significant impact on the continuing

> migration of the contaminants in the project area. No modification of highway project should be required.

(Ex. 1040; R. 10079)

Similarly, Fauble of the WNDR concluded:

> In summary, the data presented in the draft report shows that there are very low levels of VOC contamination present in the shallow ground water beneath the site. However, there were no detects of arsenic in any well. The TCE levels are well below the State's enforcement standards and are consistent with very low level TCE source originating northwest of the site, near the railroad yard. The trichloromethanes are likely the result of chlorinated municipal water that was introduced by the well construction. The very low-level gasoline range VOC detects are likely the result of small roadside spills or introduced during sampling.

(Ex. 1041; R. 10092)

Since that time, STS has continued to monitor the wells, and sampling was conducted as recently as July and October of 2002. As Art Bauman of the WDOT noted, the most recent results show that TCE levels continue to be "well below detectable limits." Arsenic levels have increased in two of the wells, but are below the DNR Prevention Action limit. These results are consistent with a Wisconsin Department of Heath [sic] and Family Services document dated February 26, 2002, entitled "Public Health Assessment for Ackerville Area Groundwater," which concludes that there is limited groundwater contamination in the Ackerville area west of the intersection

of Highways 164 and 175 and little exposure to contaminants of concern at this site.

Finally, defendants offered documentation showing that the OCR later conducted a public hearing and issued an EA and FONSI addressing the same project. At the OCR public hearing, citizens and experts offered testimony in opposition to the project and directly addressed the effect of the pilings on the landfill leachate. The OCR rejected this testimony on the ground that it was inconsistent with the defendants' EA and WDNR Memorandum.

Plaintiff disputes each of these findings, and relies heavily on the opinion of its expert, John Thresher, Jr. Thresher has prepared a two-volume evaluation of groundwater contamination in the Ackerville area, and addresses the potential impact of Highway 164 Reconstruction on Groundwater Contamination. Many of the facts included within the two-volume evaluation were raised by the plaintiff as early as the March 23, 2000, public hearing and considered by the agencies in the post-Fonsi review period.

However, agencies are entitled to rely upon their experts, and certainly the authors of the August 22, 2000, memorandum (Chad Czarkowski and Phil Fauble) appear to be specialists in their field. Plaintiff does not attack the qualifications of Czarkowski or Fauble, set forth in Docket No. 29. Fauble is a Senior Hydrogeologist with the Southeast Region Waste Management Program and has been employed by the Department of Natural Resources since September 1990. He is a Wisconsin Registered Professional Geologist, and is responsible, in part, for conducting inspections of existing and closed landfills for compliance with NR 140 (State groundwater standards) and plan

conditions. Czarkowski is a Southeast Region Drinking Water & Groundwater Program Expert and has been employed by the Department of Natural Resources since August 1979. He is a Wisconsin Registered Sanitarian, Wisconsin Certified Soil Tester and Morphological Evaluator (CST) and Wisconsin Certified Waterworks and Wastewater Operator.

Formally supplementing the EA after the depth of the pilings was known would have been a more thorough means of assessing the impact of the pilings. However, FWHA regulations do not require such action. FWHA regulations state that "[a]fter approval of the . . . FONSI . . . , the applicant shall consult with the Administration prior to requesting any major approvals or grants to establish whether or not the approved environmental documents . . . remains valid for the requested Administration action." 23 C.F.R. § 771.129(c). In other words, when a project changes, the agency must reevaluate the environmental consequences to determine whether the FONSI remains valid, and need only supplement the EA if the FONSI is found invalid. *Price Rd. Neighborhood Ass'n v. United States Dep't of Transp.*, 113 F.3d 1505, 1510 (9th Cir. 1997).

Here, defendants reevaluated the project by soliciting information from the WDNR about the effect of the pilings. Based on this information, memorialized in the WDNR memorandum, the defendants determined that the FONSI remained valid. By addressing the impact of the pilings in this fashion, it appears that defendants took a "hard look" at the project and the pilings in particular as required. Remanding the actions to the agency for reconsideration of this issue would be futile. *Cronin,* 919 F.2d at

443 (stating that the court need not remand a case if doing so would be futile).

One troubling concern is the defendants' apparent failure to hold a public hearing on the project once the planned depth of the pilings was known. Active public involvement in government decision-making affecting the environment is one of the primary goals of the NEPA. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989). However, the FWHA regulations provide that when a reevaluation is conducted, "the FWHA and the State highway agency will determine whether the changes in the project or new information warrant additional public involvement." 23 C.F.R. § 771.111(h)(3). Given the degree of controversy this project had aroused, additional public involvement might have been wise; however, the regulations did not require another public hearing. Moreover, the agencies considered written public comments before soliciting new information from WDNR. Indeed, a citizen's complaint spawned the inquiry. Thus, to a limited extent, the public involvement goal of NEPA was met.

Overall, the court is satisfied that the defendants took a hard look at the environmental consequences of the project, and that their determinations were not arbitrary and capricious.

D. Consideration of Alternatives for the Project

NEPA requires that alternatives to major federal projects be studied, and the completion of a detailed statement about the consideration that was given to those alternatives. 42 U.S.C. § 4332(2)(C)(iii) and (2)(E). Courts employ a "rule of reason" when determining whether an

agency has adequately discussed significant aspects of the environmental consequences of a project and its alternatives. *City of Grapevine, Tex. v. Dept. of Transp.*, 17 F.3d 1502, 1506 (D.C. Cir.), *cert. denied*, 115 S. Ct. 635 (1994); *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 195 (D.C. Cir.) (stating that the "rule of reason governs both *which* alternatives the agency must discuss, and the *extent* to which it must discuss them" (emphasis in original)), *cert. denied*, 502 U.S. 994 (1991). An agency is not required to examine all possible alternatives to a proposed action. *Simmons v. U. S. Corps of Army Eng.*, 1996 WL 1323088 (S.D. Ill. 1996) The court's review is to determine only whether the agency took a "hard look" at other available options, *see Eagle Found. v. Dole*, 813 F.2d 798, 803 (7th Cir. 1987), with the plaintiff having the burden of proof to demonstrate that the agency failed to do so. *See Sierra Club*, 46 F.3d at 606. The scope of the agency's inquiry must remain manageable if NEPA's goal of insuring a fully informed and well-considered decision is to be accomplished. *Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 776 (1983).

Plaintiff submits that defendants have embarked on an alternative that will cost millions and jeopardize Ackerville's drinking water to address an alleged future need for four highway lanes that "won't be needed for 25 years or more." According to plaintiff, safety concerns could have been addressed by adding gates to the railroad crossing nearby and installing traffic lights at the intersection of WIS 175 and WIS 164. Concern about traffic backing up at the intersection could have been resolved by integrating the railroad crossing gate signal with the traffic signal.

The relevant portions of the FONSI belie plaintiff's argument. It not only summarizes the consideration given to a number of alternatives, but addresses plaintiff's preferred solution:

> **Alternatives proposed by the public:**
>
> **1. Re-align intersection at STH 164/STH 175 to a right angle, reduce the steep hills along the STH 164 and STH 175, add traffic gates at the railroad crossings, and add signals at the STH 164/STH 175 intersection.**
>
> Substantial impacts to the town of Ackerville would occur by re-aligning either roadway. Adding gates at the railroad crossings would not address the fact that there are currently long delays due to the amount of train traffic here. This will only worsen in the future since Wisconsin Central Limited has plans to double the train traffic on these lines. The installation of signals does not guarantee increased safety. The close proximity of the railroad tracks to the intersection may cause traffic to back-up past the tracks while waiting to clear the intersection. This proposal does not address the need for the project in regards to upgrading Lovers Lane Road to state trunk highway standards. The 11% grade just north of the intersection, inadequate shoulder widths, poor pavement structure, and the inadequate stopping sight distances throughout the project are all substantial features of this highway which are not addressed. Also, the need for future expansion to 4 lanes has not been addressed.
>
> **2. Purpose and need of the proposed action. Include description of existing facilities, abutting facilities, and how the action**

links into the overall transportation system. When appropriate, show that commitment for future work is not being made without evaluation, and that viable alternatives in a larger framework are not being unduly foreclosed.

The Wisconsin Department has acquired jurisdiction of Lovers Lane Road as part of a larger jurisdictional transfer process involving County Highway J in Washington and Waukesha Counties. The existing facility does not meet standards for a State Trunk Highway including sight distance, pavement and shoulder widths, and clear zone requirements. The pavement structure from STH 175 to STH 60 is inadequate to support truck traffic, thus trucking is restricted from this segment of roadway. The roadway surface north of STH 175 is in good condition due to a maintenance resurfacing placed in 1992. However, prior to resurfacing, the existing roadway had experienced sever [sic] frost damage and alligator cracking throughout the project length. The roadway was advisory signed as a rough road, and residents and county maintenance officials reported the presence of tree stumps in the roadway fill and subgrade. The existing shoulder width north of STH 175 varies from two (0.6 m) to four feet (1.2 m), which is less than the standard 10-foot (3-meter) minimum for a rural State truck Highway. The intersection of Lovers Lane and State Highway 175 is a high accident location with accident rates exceeding the statewide accident rate. In 1998, there were 11 accidents at the intersection of STH 164/STH 175. The 1998 accident rate was over three times the statewide average for rural State Trunk Highways. Also associated with this intersection is the close

proximity of the railroads which may cause traffic to backup to the railroads while waiting to move through the intersection.

3. Summary of the alternatives considered and if they are not proposed for adoption, why not. (Identify which; if any, of the alternatives is the preferred alternative.)

a. *No-Action*: Under the No-Action alternative, no improvements would be made to the existing roadway except routine maintenance and resurfacing. Other than temporarily improving the pavement surface, this alternative does not address the identified deficiencies of the existing facility.

While the No-Action alternative does not meet the purpose and need for the project, it does serve as a baseline for a comparison of impacts related to the recommended alternative.

b. *Recommended Alternative*: The proposed alternative consists of reconstructing the existing 2-lane roadway from a point 0.8 km (0.5 mi) south of State highway 175 to State highway 60. The southern 0.97 (0.60 mi) would follow the existing alignment and consist of a rural section with ditches. The northern 1.2 km (0.74 mi) would be offset 8.22 m (27 ft) east of the existing alignment and consist of an urban section with curb and gutter.

An overpass structure is proposed at the Wisconsin Central Limited and the Wisconsin Southern Railroads in order to remove the existing at-grade railroad crossings. As a

result of eliminating these at-grade crossings, a new road (Sherman Road/Fond du Lac Drive connection) will be constructed along the southern railroads right-of-way. This roadway will also pass under the structure at the railroads. Additionally, an overpass structure is proposed at State Highway 175. The vertical profile of the roadway would be raised at these structures with a maximum change of 9 m (30 ft).

A connection road would be built to provide for traffic movements from Lovers Lane Road to State Highway 175. This roadway would be located in the northwest quadrant of Lovers Lane Road and State Highway 175.

Right of way requirements vary throughout the project. The right of way to be acquired along Lovers Lane Road would be sufficient to accommodate a future 4-lane roadway with a 15 m (50 ft) median through the rural section and a 9.1 m (30 ft) median through the urban section.

c. *Other alternatives considered*:

- Shifting the alignment to the east or west of the existing – Shifting the alignment to the east or west resulted in the displacement of up to three additional residential buildings as well as up to approximately three acres of additional right-of-way requirements while providing negligible benefits

- Constructing the entire length of Lovers Lane with a rural or urban section – The rural section at the north end of the project would require additional right of

way and displace two additional residences while the urban section at the south end would also require additional right of way due to the fill conditions and also posed a safety concern with the curb and gutter required with a posted speed limit of 90 km/h (55 mph)

- Maintaining an at-grade crossing with the railroads – This alternative was dropped due to serious safety concerns.

- Providing a connection route for Fond du Lac [D]rive and Sherman Road with direct access to Lovers Lane Road – due to the high fills required for the overpasses at the railroads, this alternative was not cost effective relative to the limited benefits received.

. . .

Plaintiff's assertion that the future expansion was the primary motivation and its dismissal of safety considerations is not supported by the record. Defendants prepared an Accident Analysis Report for the project, which supports the defendants' emphasis on safety. The Report states in part, that from 1999 to 2000, 35 accidents occurred along this stretch of Highway 164. The two-year average is 344% greater than the 1999 statewide average rural rate of 177. Further, excluding deer crashes the two-year average of crashes was 696 crashes per 100 million vehicle miles, which is 510% greater than the 1999 statewide average rural rate of 114. The majority of these crashes, (23 of 35) took place at the intersection of STH 164 and STH 175. (R. 1104, 05409-05415) Similarly, plaintiff has not supported its assertion that any safety concerns could have been alleviated by installing traffic

lights and gates at the nearby railroad crossing. The court is satisfied the defendants took a hard look at this alternative and made a fully informed decision to proceed with the alternative involving the overpass structure.

E. Segmentation

"[I]mproper segmentation" has been defined as an attempt by an agency to divide a major federal action into smaller components to allow those smaller components to escape the application of NEPA. *See, e.g., Scottsdale Mall v. State of Ind.*, 549 F.2d 484 (7th Cir. 1977); *Swain v. Brinegar*, 542 F.2d 364 (7th Cir. 1975) (en banc). "Segmentation analysis functions to weed out projects which are pretextually segmented, and for which there is no independent reason to exist. When the segmentation project has no independent jurisdiction, no life of its own, or is simply illogical when viewed in isolation, the segmentation will be held invalid." 23 C.F.R. § 771.111(f) (2000). "Segmentation becomes suspect, however, only after an evaluation of such factors as whether the proposed segment (1) has logical termini; (2) has substantial independent utility; (3) does not foreclose the opportunity to consider alternatives; and (4) does not irretrievably commit federal funds for closely related projects." *Save Barton Creek Ass'n v. Federal Highway Admin.*, 950 F.2d 1129, 1140 (5th Cir. 1992). "In the context of a highway within a single metropolitan area, as the case at issue – as opposed to projects joining cities – courts have focused more on the factor of 'independent utility.'" *Id.; see also Coalition on Sensible Transp., Inc. v. Dole*, 826 F.2d 60, 69 (D.C. Cir. 1987) (noting that courts focus more heavily on the independent utility factor).

According to plaintiff, defendants have admitted that the terminus of the Highway 164 project is sometimes stated as County E and other times as a hilltop north of County E. Plaintiff contends that the logical terminus is Hwy. 60, not an artificial part on a hilltop 1.3 miles south of Hwy. 60. Hence, plaintiff submits that by segmenting the project, defendants did not have to prepare an EIS for the 1.3 mile roadway that is directly in the path of a contaminant plume.

The court is not persuaded by plaintiff's arguments. As stated in Basic Sheet A of the FONSI, the main purpose and immediate need for the STH 175 to STH 60 project is to correct a safety problem at the STH 164/STH 175 intersection, correct a hazardous at-grade train crossing on STH 164 by building a bridge to cross over the train tracks and reconstruct the existing 2-lane roadway to correct the deteriorating pavement situation. Because the bridge corrects a hazardous at-grade track crossing problem, it was logical to establish the southern terminus for the project at a location after the bridge touchdown point where the reconstructed two-lane portion of STH 164 and the proposed four-lane roadway taper. *See, e.g., Village of Los Ranchos de Albuquerque v. Barnhart*, 906 F.2d 1477, 1483 (10th Cir. 1990). Moreover, neither the bridge project nor the Highway 164 road widening project requires other projects to be usable, and neither precludes or excludes future roadway projects. Because the role of this court is not to determine the best way to complete a project, but to ascertain whether the defendants made a reasonable decision in establishing project termini, plaintiff's arguments fail. As noted earlier, the defendants' decision was reasonable and will not be upset.

Now, therefore,

IT IS ORDERED that plaintiff's motion for a preliminary injunction (Doc. #3) is denied.

IT IS FURTHER ORDERED that defendants' motion requesting the denial of the relief plaintiff seeks and judgment in defendants' favor (Doc. #34) is granted.

IT IS FURTHER ORDERED that this case is dismissed.

Dated at Milwaukee, Wisconsin, this 4th day of June, 2003.

BY THE COURT

/s/ C. N. Clevert, Jr.
C. N. CLEVERT, JR.
U. S. District Judge

This 4th day of June, 2003, pursuant to Rule 77(d) Federal Rules of Civil Procedure, copies of this document were mailed by M. Jones to the following parties:

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Madison, WI 53702

United States District Court

EASTERN DISTRICT OF WISCONSIN

JUDGMENT IN A CIVIL CASE

HIGHWAY J CITIZENS GROUP,

Plaintiff,

v.

NORMAN MINETA, in his capacity as Secretary United States Department of Transportation; FREDERICK WRIGHT, in his capacity as Executive Director, Federal Highway Administration; THOMAS E. CARLSEN, in his capacity as Acting Secretary, Wisconsin Department of Transportation,

Defendants.

Case No.02-C-0662

(Filed Jun 4, 2003)

This action came before the court. The issues have been decided and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that this case is dismissed.

APPROVED: /s/ C.N. Clevert, Jr.
C.N. CLEVERT
U.S. District Judge

/s/ Sofron B. Nedilsky
Clerk

6-4-03 /s/ M. Jones
Date *(By) Deputy Clerk*

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42 U.S.C. § 4332. Cooperation of agencies; reports; availability of information; recommendations; international and national coordination of efforts

The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this Act, [42 USCS §§ 4321 et seq.], and (2) all agencies of the Federal Government shall –

(A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decision-making which may have an impact on man's environment;

(B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by title II of this Act [42 USCS §§ 4341 et seq.], which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decision-making along with economic and technical considerations;

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on –

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of title 5, United States Code, and shall accompany the proposal through the existing agency review processes;

(D) Any detailed statement required under subparagraph (C) after January 1, 1970, for any major Federal action funded under a program of grants to States shall not be deemed to be legally insufficient solely by reason of having been prepared by a State agency or official, if:

(i) the State agency or official has statewide jurisdiction and has the responsibility for such action,

(ii) the responsible Federal official furnishes guidance and participates in such preparation,

(iii) the responsible Federal official independently evaluates such statement prior to its approval and adoption, and

(iv) after January 1, 1976, the responsible Federal official provides early notification to, and solicits the views of, any other State or any Federal land management entity of any action or any alternative thereto which may have significant impacts upon such State or affected Federal land management entity and, if there is any disagreement on such impacts, prepares a written assessment of such impacts and views for incorporation into such detailed statement.

The procedures in this subparagraph shall not relieve the Federal official of his responsibilities for the scope, objectivity, and content of the entire statement or of any other responsibility under this Act [42 USCS §§ 4321 et seq.]; and further, this subparagraph does not affect the legal sufficiency of statements prepared by State agencies with less than statewide jurisdiction. [;]

(E) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;

(F) recognize the worldwide and long-range character of environmental problems and, where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment;

(G) make available to States, counties, municipalities, institutions, and individuals, advice and information useful in restoring, maintaining, and enhancing the quality of the environment;

(H) initiate and utilize ecological information in the planning and development of resource-oriented projects; and

(I) assist the Council on Environmental Quality established by title II of this Act [42 USCS §§ 4341 et seq.].

40 C.F.R. § 1508.27 Significantly.

"Significantly" as used in NEPA requires considerations of both context and intensity:

(a) Context. This means that the significance of an action must be analyzed in several contexts such as society as a whole (human, national), the affected region, the affected interests, and the locality. Significance varies with the setting of the proposed action. For instance, in the case of a site-specific action, significance would usually depend upon the effects in the locale rather than in the world as a whole. Both short- and long-term effects are relevant.

(b) Intensity. This refers to the severity of impact. Responsible officials must bear in mind that more than one agency may make decisions about partial aspects of a major action. The following should be considered in evaluating intensity:

(1) Impacts that may be both beneficial and adverse. A significant effect may exist even if the Federal agency believes that on balance the effect will be beneficial.

(2) The degree to which the proposed action affects public health or safety.

(3) Unique characteristics of the geographic area such as proximity to historic or cultural resources, park lands, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas.

(4) The degree to which the effects on the quality of the human environment are likely to be highly controversial.

(5) The degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks.

(6) The degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration.

(7) Whether the action is related to other actions with individually insignificant but cumulatively significant impacts. Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment. Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts.

(8) The degree to which the action may adversely affect districts, sites, highways, structures, or objects listed in or eligible for listing in the National Register of Historic Places or may cause loss or destruction of significant scientific, cultural, or historical resources.

(9) The degree to which the action may adversely affect an endangered or threatened species or its habitat that has been determined to be critical under the Endangered Species Act of 1973.

(10) Whether the action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment.